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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, TOWER LANES, INC., a corporation, BOWLERO, INC., a corporation, DAFFODIL BOWL, INC., a corporation, PARADISE BOWL, INC., a corporation, C. A. LOYD and JANE DOE LOYD, his wife, d/b/a SIXTH AVENUE LANES, THEODORE TADICH and JANE DOE TADICH, his wife, Dez ISAACSON and JANE DOE ISAACSON, his wife, KENNETH KULM and JANE DOE KULM, his wife, PHILLIP CUNNINGHAM and JANE DOE CUNNINGHAM, his wife, CLEVE REDIG and JANE DOE REDIG, his wife, and ART UNKRUR and JANE DOE UNKRUR, his wife,

Petitioners,

VS.

PACIFIC LANES, INC., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that this Court issue its writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review the judgment entered in the above case on February 2, 1966.

Opinions Below

The United States District Court for the Western District of Washington, Northern Division, rendered an unreported memorandum decision on March 9, 1965, denying petitioners' post-trial motion. (Appendix A.) The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the District Court, is reported at 356 F.2d 371. (Appendix B.)

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was made and entered February 2, 1966. Petitioners' petition for rehearing was denied March 21, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code § 1254(1).

Questions Presented

The Court of Appeals has sanctioned the action of the District Court in directing the jury to find that petitioners' tournament eligibility rule constituted a per se illegal group boycott of non-member bowling proprietors. Thus struck down is the action of a group of bowling establishment proprietors in Washington who promoted their businesses by making eligible for their recreational bowling tournaments those customers who limited their league bowling to the establishments of the group, but required no limitation of the customers' other, or "open," bowling. No coercion was exerted on the customers to qualify themselves by doing their league bowling exclusively in those establishments, nor was open bowling adversely affected. Nothing required or forced customers to participate in petitioners' tournaments, either in lieu of or in addition to the multitude of other bowling tournaments available to them. Whether they did so depended entirely upon

whether they wanted to bowl in petitioners' tournaments enough to qualify. They were not affected in their trade or business. Rather, they were simply rewarded for exclusive patronage in their league bowling. Thus, the initial question presented is:

1. Was the per se rule of liability under the Federal antitrust laws, rather than the rule of reason, correctly applied to a business-building promotion which rewarded a customer with eligibility to participate in a sport tournament in exchange for doing a portion of his recreational activities in petitioners' establishments? Or otherwise stated, should the per se illegality of a group boycott, heretofore applicable only to a commercial boycott which forces by economic pressure conformance to its mandate, be extended to a trade association's promotional activities which at most encourage customer loyalty to its members?

Depending on the answer to the foregoing, there is the further question respecting the manner in which the per se rule was applied in this case:

2. Is it the function of the jury to determine whether or not the evidence establishes the factual existence of a per se group boycott, and thus to determine the factual basis of the petitioners' liability, or as was done here, may the court instruct the jury both that a group boycott is per se illegal and that the petitioners' conduct was in fact such a boycott?

A third question is presented involving petitioners' liability:

3. Did the Court of Appeals properly sanction the District Court's denial of petitioners' motion for directed verdict in that the requisite effect upon interstate commerce was not proved by legally sufficient evidence?

An additional question is presented involving damages:

4. Was the respondent properly allowed to recover damages based upon acts of the petitioners occurring after the date the complaint was filed, notwithstanding no supplemental complaint for the recovery thereof was ever filed and petitioners consistently objected to this extra-judicial enlargement of the recovery?

The Constitutional Provision, Statutes, and Federal Rules Of Civil Procedure Involved.

The petitioners have been found liable to respondent for violation of Sections 1 and 2 of the Sherman Act. These provisions are thus pertinent in Points I, II, and III hereof:

Section 1 of the Sherman Act (15 USCA § 1) in pertinent part reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . "

Section 2 of the Sherman Act (15 USCA § 2) in pertinent part reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . "

The Seventh Amendment to the Constitution of the United States, involved in Point II hereof, provides in pertinent part:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Rules 15(d) and 16 of the Federal Rules of Civil Procedure are involved in Point IV herein:

Rule 15. Amended and Supplemental Pleadings

* * * * * * * * * * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Statement of the Case

Respondent, Pacific Lanes, Inc., the proprietor of a bowling establishment in Tacoma, Washington, commenced this action on December 7, 1961 for treble damages under the Federal antitrust laws. (R. 1.) The defendant-petitioners are proprietors of other bowling establishments in Tacoma and also the Washington State Bowling Proprietors Association (WSBPA) and the Pierce-Olympic Bowling Proprietors Association (POBPA), respectively the state and a local trade association of bowling proprietors. The proprietor-petitioners were members, and respondent was at one time a member, of both associations.

Respondent claimed that beginning sometime prior to the time it opened for business on October 9, 1959, the petitioners engaged in a conspiracy and combination extending throughout the United States, including western Washington, consisting of a continuing agreement and concert of action by the petitioners and other co-conspirators:

1. To conduct bowling tournaments open only to those who restrict their league and tournament bowling entirely to member establishments, thereby declaring ineligible any bowler who does or has done any such bowling in a non-member establishment.

2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments and by soliciting suppliers of bowling equipment and other persons not to deal with such persons.

3. To fix and stabilize prices charged for bowling and to refrain from competing for patronage except as against non-member establishments.

4. To regulate and control the size of bowling establishments and the conditions under which bowling may be carried on. (R. 5-6, 170-172.)

Respondent claimed that the conspiracy caused injury to its business to the extent of $40,000 actual damages, and constituted an unlawful combination in restraint of, and an unlawful attempt to monopolize, interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act. (R. 7, 8.)

The District Court was vested with jurisdiction of the case under 15 U. S. Code §§ 15, 26 and under 28 U. S. Code § 1337.

No amended or supplemental complaint was ever filed. In November 1964, a pre-trial conference was held and a pre-trial order reflecting what occurred was agreed to and ultimately entered on December 11, 1964, after the trial had commenced. (R. 160.) The order recited no amendment or supplement to the complaint, although it did recite the respondent's contention that its damages were $50,000 instead of the initially pleaded $40,000. (R. 174.)

The trial before a jury commenced December 4, 1964. (Tr. 1.) The evidence principally concerned the tournament eligibility rules of the Bowling Proprietors' Association of America, Inc. and the WSBPA, described more particularly below, and the "overbuilding" activities of these associations whereby, according to respondent, they conspired to dissuade or coerce others from building new bowling establishments. However, during the trial, *respondent repeatedly acknowledged that the only damages*

it suffered because of the conspiracy were caused by the tournament eligibility rule (Item 1 above of the alleged conspiracy) and that it had not been damaged by the alleged overbuilding activities (Items 2 and 4) or the alleged price fixing (Item 3). (Tr. 170, 176, 1175-7, 1248-9, 2043-8.)

Over petitioners' objections, *inter alia,* that the per se rule was not applicable, the District Court charged the jury that group boycotts and price fixing were per se violations of the Sherman Act regardless of the surrounding circumstances, and that the tournament eligibility rule was a group boycott. The Court expressly required in the price-fixing instructions that the jury first find the petitioners had conspired to fix prices. In contrast, the jury was *not* instructed that they must first find the petitioners had conspired to establish a group boycott.

The case was submitted to the jury on special interrogatories which the jury answered in respondent's favor, finding its actual damages to be $35,000. (R. 219-226; Tr. 2813-7.) To reach this amount, the jury necessarily had to include damages based upon acts committed after the complaint was filed on December 7, 1961, as it was instructed to do by the court. This instruction was directly contrary to petitioners' objections and to their requested instruction that only acts prior to the filing date could be considered as the basis for damages.

After petitioners' motion for judgment n.o.v. or for a new trial was denied (R. 232), judgment was entered on the verdict on March 9, 1965 for $127,500, being treble the actual damages awarded plus an allowance of $22,500 for respondent's attorneys' fees. (R. 249.)

Bowling

Bowling has become one of the most popular sports or recreations in the United States. Approximately 36 million Americans bowl each year and they are served by approximately 9,500 commercial bowling establishments. (R. 95.)

About 6,500 of the commercial establishments are owned by members of the Bowling Proprietors' Association of America, Inc. (BPAA), the national trade association of proprietors. (R. 95; Tr. 122, 126.) There are 50 state trade associations of bowling proprietors affiliated with the BPAA, of which the WSBPA is one. (Tr. 130-1, 149.) There are in addition local trade associations of proprietors affiliated with the BPAA through their respective state association. The POBPA is one such local association, its members being about 75% of the proprietors in and about Tacoma, Washington. (Tr. 131, 149; DX A-8.) Individual bowling proprietors who are members of their respective local and state associations automatically are members of the BPAA. (Tr. 131.)

Bowlers primarily engage in, and bowling proprietors derive their income primarily from, open play and league play. "Open play" refers to the patronage of individual bowlers competing among themselves. "League play" refers to organized leagues of bowlers consisting of competing teams of up to five members per team and up to eight teams per league. Leagues ordinarily bowl one night per week at a scheduled time during a season of from 32 to 36 weeks per year, roughly parallel to the fall, winter, and early spring. (R. 163.) League bowling accounts for about half of the total revenue of commercial establishments. Each year approximately 7 million men and women engage in league bowling in the United States. (R. 95.) Their participation in league bowling is not their occupation or business. They are simply interested in bowling as a leisure time recreation or sport. (Tr. 441, 459,

472, 479, 487, 497, 507, 517, 530, 538, 626, 635, 646, 657, 663, 671, 678, 684, 688, 703, 712, 722, 766, 771, 776, 816.)

There are also associations of bowlers. The American Bowling Congress has about 5 to 7 million male bowler members. About 3 million women bowlers are members of the Women's International Bowling Congress. (Tr. 142, 227-8.) The ABC prescribes the standards for lanes, equipment and scorekeeping, as well as the rules for playing the game and for tournaments. (Tr. 2394-5.) There are state and local associations or chapters of the ABC and the WIBC, including the Washington State Bowling Association which has about 100,000 members and the Washington State Women's Bowling Association which has about 74,000 members. (Tr. 75, 76, 228.)

Bowling Tournaments

Tournament bowling is that type of bowling done by individuals or teams, or combinations of both, in a prearranged contest in which participants generally compete to determine the highest score for prizes in cash or trophies. (R. 163.) The ABC and its state and local chapters, the BPAA, state and local bowling proprietor associations, individual proprietors, independent tournament promoters, bowling equipment manufacturers, and numerous industrial and commercial enterprises, conduct or sponsor bowling tournaments. (R. 163; Tr. 145, 2206-7.) There were many tournaments open to all bowlers in the geographical area served by WSBPA. The defendants sponsored, and the eligibility rule applied to only a limited number of these.

In general, only a small number of bowlers, usually the better-than-average bowlers, want to compete in tournaments. (Tr. 365, 1839, 2328-9.) Only five to ten percent of all Washington bowlers participate in tournaments in

that state. (Tr. 2116.) There is only limited participation in national tournaments (Tr. 2125), such as the eight annual tournaments sponsored by BPAA in different principal cities in the United States. (R. 95-6.) BPAA has generally suffered a deficit in its national tournament program and part of its dues income from member proprietors is earmarked for its tournament program. (Tr. 2097-8, 2147, 2277.) Proprietor association tournaments generally are not profitable. (Tr. 1541-3, 1613, 1664-5, 2409; PX 225.) In recent years tournaments have been on a decline in Washington. (PX 225.)

The basic purpose of a bowling tournament is the promotion of the game and to provide competition for people interested in the game. A bowling tournament is a way of thanking customers for their patronage. (Tr. 143, 385, 2098; PX 182, 227.)

Tournament Eligibility Rules

During the time respondent was a member of the POBPA and other associations, it was not affected by any tournament eligibility rule. It resigned from POBPA in the 1960-61 bowling season, and claimed no damages based upon that season since no eligibility rule could have applied to its bowlers until after the close of that season in June 1961. (Tr. 1127, 1132, 1621, 1622, 1874; PX 98.)

The BPAA had a tournament eligibility rule which made eligible for its tournaments those bowlers who did all their league and tournament bowling in BPAA-member establishments. (Tr. 202-3, 206, 209, 211-3; R. 163-4.) In and after June 1961, the BPAA rule applied only to eligibility for its national tournaments. There is no evidence that respondent lost any bowling business because some of its bowlers wanted to participate in one of BPAA's national tournaments. Consequently, the only eligibility rule which

could have applied to cause any of the damages claimed was the WSBPA rule.

The WSBPA's eligibility rule applied only to tournaments conducted or sponsored by it, and provided:

> "This tournament is restricted to bowlers who do their league and tournament bowling exclusively in member BPAA houses. Proprietors, stockholders, and employees of non-member houses are not eligible to compete under any circumstances. It is the bowler's responsibility to ascertain if the establishment where he bowls is a member in good standing of the BPAA and he personally meets all eligibility requirements of this tournament." (R. 174.)

There is no evidence that BPAA had anything to do with the adoption, terms, or enforcement of the WSBPA rule.

The basic reason for these eligibility rules is that a tournament sponsored by a proprietors' association should benefit that association's members and their customers who support, finance and make the tournament possible. Non-member proprietors and non-customers do not contribute in any way to such a tournament. (Tr. 1669-71.) This is true also of ABC tournaments, participation in which is limited strictly to ABC members. The reason for this is that non-members should not be entitled to the same benefits as members, and one benefit of ABC membership is its tournaments and other prizes. (Tr. 105-7, 2385-6; PX 239, 240.)

In addition, the WSBPA eligibility rule was adopted in part to keep its tournaments honest and above board by avoiding "sandbagging." Sandbagging refers to a bowler who deliberately keeps his score or average down so that he will get a better handicap than he deserves and will have an unfair advantage in handicap tournament play. Limiting eligibility to participate in tournaments sponsored by WSBPA to bowlers from member houses enables the pro-

prietors supporting the WSBPA tournaments to know first-hand the proper handicaps for the participants, and thus to reject or reclassify sandbaggers. (Tr. 90, 385-6, 1529-30, 1655, 1708, 1754-6, 1034, 1871, 2082, 2132, 2135, 2163, 2194, 2360, 2382.) In any sport, the standards and conditions for play must be uniform for all participants. To the extent the eligibility rule is concerned with such standards and conditions, it is common and widespread throughout most sports. (Tr. 1936-38.)

While the WSBPA eligibility rule was enforced, the actual number of bowlers declared ineligible for WSBPA tournaments is not shown. Proprietors testified that only a few persons were declared ineligible. (Tr. 1711-12, 2174, 2272-3, 2354, 2360, 2383.) Fourteen witnesses testified for the respondent that they had been declared ineligible because of their bowling in a league in respondent's establishment. However, most of these witnesses continued to do their bowling at Pacific Lanes despite their resultant ineligibility to bowl in WSBPA tournaments. (Tr. 473-6, 490, 504, 665-8, 683, 688, 703, 771, 785, 816.) Moreover, respondent was successful in forming leagues after it resigned from POBPA, and actually had more leagues at the time of the trial in 1964 than it had when it was a member notwithstanding its claim that specific leagues stopped bowling at Pacific Lanes because the bowlers wanted to be eligible for WSBPA tournaments. (Tr. 1184, 446-7, 458, 465-8, 470, 534, 691, 1187, 1375, 1743.)*

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*Note: To be eligible for WSBPA tournaments, a bowler also had to do whatever tournament bowling he did in WSBPA member establishments. As already noted, tournament bowling is neither a significant part of the sport of bowling nor does it provide any significant profit to the proprietor. The same reasons, however, existed to encourage customers to patronize member's tournaments as to encourage their patronizing member establishments for their league bowling.

REASONS FOR GRANTING THE WRIT.

I.

By Applying The Per Se Rule Of Antitrust Liability To An Eligibility Rule for Recreational Tournaments, The Court of Appeals Has Misinterpreted And Grossly Extended This Court's Decisions In the Group Boycott Field. Moreover, Its Decision Conflicts With Other Decisions Which Have Properly Construed and Applied This Court's Decisions.

The Court of Appeals has sanctioned an extension of the *per se* rule which goes far beyond anything this Court has decided and which conflicts with other Court of Appeals' decisions. Its holding makes *per se* illegal trade association activity designed to promote business and denies any defense based upon the reasonableness of that activity. It would make *per se* illegal the action of any group of sellers agreeing to reward their customers by a free trip, a free game, or other premium based on patronage, if the effect is to encourage (not force or coerce) the customers to give their patronage to members of the group and thus to this extent not to patronize competitors. Yet that is the effect of every business promotional activity. Unless such activity amounts to a commercial boycott which forces by economic pressure conformance to its mandate and thus which forces the customers to help effectuate, it should not be illegal *per se*. Rather, promotional activities which but encourage consumer loyalty should be illegal only if found unreasonable.

The decision of the Court of Appeals will stifle, not promote competition. The providing of a reward in the form of tournament eligibility because the customer patronizes

a member of a group offering that tournament should not be *per se* illegal. The issue in such a case should be whether or not this is a reasonable way in which to promote patronage and to compete. This question of reasonableness was taken from the jury by the unwarranted extension of the *per se* doctrine in this case.

A. The Nature of the Eligibility Rule.

The WSBPA eligibility rule defines those eligible to participate in its bowling tournaments. WSBPA and its member proprietors bear the expense and other burdens of conducting its tournaments. They have limited eligibility to those bowlers who do their league bowling exclusively in member houses and, thus, to those who by their patronage have largely made it possible for the members and the WSBPA to conduct its tournaments.

Other aspects of the eligibility rule should also be noted:

1. Bowling in WSBPA tournaments, or in any other of the numerous tournaments sponsored or conducted by others, is a game or recreation, and is not a part of the business or occupation of the bowlers. Thus, the eligibility rule has no application to or relationship with the trade or business of any bowler.

2. The eligibility rule has no coercive element or effect. Participation in any WSBPA tournament arises solely from each bowler's voluntary desire to participate in the tournament and not because he is forced to participate in order to obtain something necessary to his trade or business or to obtain something necessary to his recreational pursuits. A bowler suffers no loss of standing or other detriment in his bowling pursuits if he is not eligible for

or otherwise does not bowl in WSBPA tournaments. There is no requirement of the ABC or any other bowling organization that bowlers must participate in any tournament. Thus, a bowler's opportunity or independence to decide for himself when and where he will do his league bowling is not affected.

3. Except for participation in WSBPA tournaments, nothing is withheld by the petitioners from any bowler not qualified to participate. Petitioners do not refuse to deal with anyone who wants to bowl in their establishments. The association simply limits its tournaments to eligible bowlers.

4. Only a small number of bowlers (5-10% of all bowlers in Washington) are interested at all in bowling in tournaments. Consequently, only a small number of bowlers can possibly be affected by the eligibility rule.

5. WSBPA tournaments, as well as all bowling proprietor association tournaments, are but a small percentage of the multitude of bowling tournaments available to bowlers. Those disinterested in or ineligible for proprietor tournaments have many other tournaments available in which they may pursue this part of the game. Here again, if a bowler wants to participate in a WSBPA tournament, it is because of his voluntary wish to do so, and not because these tournaments are the only ones available to him.

Thus, the eligibility rule pertains and has significance only to a relatively small part of the bowling public, those who want to include tournament bowling in their recreational pursuits, and then only to those desiring to participate in WSBPA tournaments as contrasted with or in addition to the multitude of other tournaments available.

Furthermore, the rule has no commercial or economic aspect since it in no way affects the trade or business of those bowlers who are interested in WSBPA tournaments. And it has no coercive aspect since nothing requires a bowler to participate in WSBPA tournaments and he suffers no detriment if he does not participate. In short, the eligibility rule does not destroy or affect the independence of bowlers to decide where they want to bowl. At most, its effect on bowlers, and hence on the business of non-member proprietors, is narrow and incidental, a factor which heretofore has always been significant in antitrust cases. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 239-240 (1917).

B. This Court's Decisions Concerning Group Boycotts Involved Conduct Entirely Different From That Involved Here.

This Court's declarations that a group boycott is *per se* illegal of necessity applied only to those situations in which the boycott was used as a means of coercion, imposing economic sanctions to force the restriction of trade to the boycotter. To apply the *per se* rule to a situation in which there is *no coercion,* but where there is instead an intensification of competition by providing a reward for custom, is to place a limitation upon competition. The effect of the rule announced by the Court of Appeals is to restrict competition, stifle imaginative trade promotional activities, and deny to the consumer a reward for his trade.

The cases in which the *per se* rule has been announced by this Court should not be permitted to form the basis for an anti-competitive doctrine. The *per se* rule, while a salu-

tory one, should not be carried to the anti-competitive excess of the instant case.

This Court has held in a series of cases that a "group boycott" is a *per se* violation of the Sherman Act. *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959); *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Radiant Burners* v. *People's Gas Company,* 364 U.S. 656 (1960); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). But the term "group boycott" demands definition. Applied as it has been by the Court of Appeals in this case, it would encompass all trade association activity designed to promote business by rewarding loyal customers. This is not the kind of activity which this Court has held to be a group boycott.

In *Klor's,* 359 U.S. 207, the complaint alleged that Broadway-Hale, an operator of a chain of retail appliance stores, threatened to withhold its extensive patronage from certain national manufacturers and distributors of household appliances and thereby forced the latter collectively to refuse to sell their appliances to Klor's, a retail competitor of Broadway-Hale. It was the coercive economic pressure which Broadway-Hale brought to bear on the manufacturers and distributors which forced them in turn to boycott Klor's.

In the *Fashion Originators' Guild* case, 312 U.S. 457, the Guild members, who designed and manufactured women's garments, collectively refused to sell their garments to any retailer who sold garments made by other manufacturers which were copied or pirated from Guild designs. Under threat of boycott by Guild members, and the consequent injury to their retail businesses if they could not

obtain garments from Guild members, the retailers agreed not to trade with the style pirates. The retailers were forced to do this by the coercive economic pressure of the Guild members, and their freedom to determine from whom they would obtain garments was destroyed.

In *Radiant Burners,* 364 U.S. 656, the complaint alleged an arbitrary refusal by the American Gas Association to approve radiant burners, coupled with the collective refusal of the utility members of the association to sell gas for use in any unapproved burner. The effect of this two-fold refusal to deal was an absolute boycott of radiant burners and the consequent destruction of plaintiff's business since, denied gas, would-be customers were coerced to refuse to purchase the burners. They could not obtain gas from any other source. This was economic pressure of the grossest sort, since it made worthless the customer's investment in a radiant burner. Contrast the situation of the bowler who can bowl anywhere he *wishes,* participate in any of a number of other tournaments if he *wishes,* and assuming he does not already want to do so for a variety of other reasons, need do his league bowling in one of petitioners' establishments only if he *wishes* to be eligible for WSBPA tournaments.

In *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), the Exchange refused to allow any of its members to maintain private stock ticker connections with Silver, a non-member. The ticker service was the only practical way to be informed about Exchange prices, an essential element of Silver's business. As this Court stated (p. 347), "The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving peti-

tioners of a valuable business service which they *needed* in order to compete effectively. . . ." (All emphasis herein is supplied unless otherwise noted.)

There is one salient characteristic of these group boycott cases, which is wholly absent in the case at bar: **Coercive economic pressure was applied to force the result.** All of the defendants in these cases had and used economic power which on its face was sufficient to cause the boycott to occur. The applicance manufacturers and distributors, the garment retailers, the prospective purchasers of radiant burners, and the Exchange members had no real choice or opportunity to deal with the respective victim even had they wanted to. Their economic needs *forced* them to conform to the boycott. The group boycotts which this Court has held to be *per se* illegal are those which, as stated in *Klor's*, 359 U.S. at p. 212, "*cripple* the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." "[G]roup action *coercing* outside parties" is the basis for the *per se* rule in this field. *Report of Attorney General's Committee on the Anti-Trust Laws*, p. 133 (1955).

In contrast, the petitioners had no economic power over the bowlers. They had no means by which to apply economic pressure to coerce bowlers to effectuate the alleged boycott. No economic need of any bowler forced him into any of petitioners' establishments. The offer of participation in WSBPA tournaments is no more than an encouragement to bowl in member houses. Its effect upon bowlers is not analogous to the facts in the *per se* cases where the effect of the defendants' conduct was such that traders, in order to protect themselves from retribution and injury, were forced to boycott the victim.

In no possible sense was the eligibility rule a "concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others . . ." (Charge to Jury, Tr. 2773.) The petitioners here were anxious to deal with the bowlers; they never refused to *sell* services to the bowlers. There was no refusal to deal here; there was simply an added fillip, a promotional reward, for those bowlers who *chose* to limit their league bowling to petitioners' establishments in the exercise of the bowlers' free choice to participate in petitioners' tournaments.

This is not a commercial boycott. There is no denial of access to some essential element of trade or business. It is the difference between a group of fashion designers refusing to sell to retailers who stock their competitors' frocks and the same group of fashion designers offering a chance on a free trip to Paris only to those women who wear the group's brand of frocks every day for a month. Only those women who choose to try for the free trip need limit their purchases to the offering group. Only if such an offer is found to be unreasonable is it illegal; it is not illegal *per se*.

An important Federal question involving the application of the *per se* rule of liability in the group boycott field is thus raised and is decisive in the case at bar. Neither on the facts nor as the necessary result of the legal principles developed has this Court extended the *per se* rule to anything analogous to so innocuous a thing as an eligibility rule for recreational tournaments. Nothing in its previous decisions suggests that this Court would do so in this case. Yet, the lower courts have done so here, depriving peti-

tioners of a jury determination which should have applied the rule of reason. Thus, apart from the conflict between the decision here and the authorities next discussed, this Court should review and correct the Court of Appeals' decision in line with its recent statement in *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 178, decided December 6, 1965, that "the area of *per se* liability is carefully limited."

C. The Court Of Appeals' Decision Conflicts With The Decision of Another Panel of the Same Court.

Nothing illustrates the extent to which the Court of Appeals has misconstrued and misapplied this Court's boycott cases more clearly than the decision of a different panel of that Court in *Deesen* v. *Professional Golfers' Association of America, et al.*, announced February 23, 1966. Since the *Deesen* opinion is not yet reported, it is set out in full in Appendix C.

Deesen, a professional golfer, claimed that the PGA and its members, by eligibility rules for PGA-sponsored professional golf tournaments, collectively boycotted him and combined to monopolize the business of tournament golf professionals in violation of Sections 1 and 2 of the Sherman Act. On the authority of *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1917), without even so much as mentioning the *per se* rule, the Court of Appeals applied *the rule of reason* and affirmed the decision of the District Court that the PGA eligibility rules were *reasonable* and that the Sherman Act had not been violated. It is manifest

throughout the *Deesen* opinion the Court of Appeals held the PGA was entitled to adopt reasonable rules of eligibility for participation in its tournaments.

In contrast, in the case at bar, involving recreational tournaments as contrasted with tournaments in which professionals competed as a part of their occupation, the WSBPA tournament eligibility rule has been struck down as a *per se* violation without regard whether or not under the evidence it was reasonable for WSBPA to limit its tournaments to the best customers of its members, as a "thank you" or premium to those whose patronage made the tournaments possible in the first place.

The *Deesen* case involved a collective refusal to deal directly causing injury to Deesen in his occupation as a professional golfer. If all group boycotts are *per se* illegal, then *Deesen* was wrongly decided. If, as we contend, the above-described factors must be present before a group boycott is *per se* illegal, then the case at bar was wrongly decided. In either event, the conflict between *Deesen* and the case at bar should be resolved by this Court.

D. The Court of Appeals' Decision Also Conflicts With Other Decisions.

Other cases further support the conclusion that since the tournament eligibility rule is not the type of activity or conduct which has been deemed to be a *per se* group boycott, its legality in the case at bar should have been determined by the application of the rule of reason. There is clear and persuasive authority that the rule of reason rather than the *per se* rule was applicable here. *Union Circulation*

Company v. *FTC*, 241 F.2d 652, 656-657 (2d Cir. 1957); *United States* v. *Insurance Board of Cleveland*, 144 F.Supp. 684, 686-688 (N.D. Ohio 1956), *ibid*, 188 F.Supp. 949, 954-955 (N.D. Ohio 1960); *United States* v. *United States Trotting Association*, 1960 Trade Cases ¶ 69,761 (S.D. Ohio 1960). These authorities have interpreted this Court's *per se* decisions in the boycott field as petitioners here submit is the proper interpretation. *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1917), was not overruled by *Klor's* or *Fashion Originators*.

In the *Union Circulating Company* case, for example, after acknowledging that many group boycotts are *per se* illegal (citing *inter alia*, the *Fashion Originators Guild* case), the Second Circuit said (241 F.2d at pp. 656-657):

> ". . . When the courts or the Commission are confronted with an alleged boycott whose deleterious effect on competition is not as apparent on its face as that of the agreements which have been held illegal *per se*, they may consider its actual or potential impact upon the competitive fabric of the particular industry affected. Ruddy Brook Clothes v. British Foreign & Marine Ins. Co., 7 Cir., 195 F.2d 86, certiorari denied, 1952, 344 U.S. 816, 73 S.Ct. 10, 97 L.Ed. 635; United States v. Insurance Board of Cleveland, D.C.N.D. Ohio 1956, 144 F.Supp. 684. The restraints here under consideration, the 'no-switching' agreements, are dissimilar in several significant respects to the group boycotts that have been held illegal *per se* by the Supreme Court. The 'no-switching' agreements are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices. *These agreements are not designed to coerce retailers, or other independent members of an industry, into abandoning competitive practices of which the concerted*

parties do not approve. Rather, they are ostensibly directed at 'housecleaning' within the ranks of the signatory organizations themselves. *Because a harmful effect upon competition is not clearly apparent from the terms of these agreements, we believe them to be distinguishable from those boycotts that have been held illegal per se.* See United States v. Insurance Board of Cleveland, *supra,* 144 F.Supp. at pages 696-698. . . ."

In the *United States Trotting Association* case, *supra,* 1960 Trade Cases ¶ 69,761, the government contended the rules of the Association amounted to illegal group boycotts. The rules in question provided, in part, that horses racing on tracks which were not USTA members or in meets which were not USTA sanctioned were barred from receiving eligibility certificates which were essential if a horse was to be eligible to participate on member tracks and in sanctioned races. The District Court upheld the Association, stating:

"Defendant's rules and regulations, singled out by the Government's motion for summary judgment, insofar as they may be called group boycotts, or concerted refusals to deal, are not such commercial boycotts as have been stricken down in previous cases as unlawful *per se.* The Court is not unmindful of *Klors, Inc.* v. *Broadway-Hale Stores, Inc., et al.* (1959 Trade Cases ¶ 69,316), 359 U.S. 207. However, the Court is of the opinion that *Klor's* is distinguishable upon its facts from the instant case in that it, too, dealt with such commercial boycotts. Therefore the Court finds that the Government's motion for summary judgment should be overruled."

And in *United States* v. *Insurance Board of Cleveland, supra,* 144 F.Supp. 684, the District Court concluded that *per se* illegality attached only to group boycotts involving

"coercive action against parties outside the group." (See 144 F.Supp. at pp. 696-698.) The court stated:

> "The construction for which the Government contends holds the *dicta* to be an unqualified condemnation of all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination. Within the all-embracing compass of this construction a group refusal to deal motivated by legitimate business reasons, exerting no coercion upon outsiders and resulting in no unreasonable restraint of trade, would nevertheless be a violation of the antitrust act. The Government's contention goes too far. *Under its interpretation many innocent practices of trade associations which only indirectly affect outsiders and which create no unreasonable restraint of trade would be brought within the ban of the Act and the alleged offenders denied the opportunity to justify their conduct. Such a construction is squarely in conflict with the Rule of Reason.*"

After trial, the District Court rendered another opinion, again refuting the *per se* contention. 188 F.Supp. 949. The Court noted that after its first opinion, *Northern Pacific Ry.* v. *U.S.*, 356 U.S. 1, and *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, had been decided. After a full discussion of these decisions, the Court reaffirmed its initial decision, in pertinent part stating (p. 955):

> "*Coercive economic pressure affects the degree of restraint and is frequently, if not always, a distinguishing characteristic of concerted refusals to deal that are conclusively presumed to be unlawful.* The presence or absence of such elements, therefore, would seem clearly to be relevant to the issue whether the restraint of a concerted refusal to deal is unreasonable *per se*. . . ." (Emphasis added.)

The decision of the Court of Appeals here is "an unqualified condemnation of all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination." It is of great importance that the present conflict between the instant case, which applies a *per se* rule to action by a group of suppliers of a recreational service who provided a reward to their customers, and all other cases which apply a rule of reason to the imposition of eligibility rules, be resolved.* It is of greater importance that the efforts of

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* Note: Disapproval of the indiscriminate application of the per se rule to group boycotts has also been voiced in professional journals, largely premised on the facts that, as Professor Rahl states. "[m]any types of joint refusals to deal . . . have neither an element of coercion, nor an element of purpose to suppress competition. . . . A boycott rule which is not geared to a cogent test of effect on competition is . . . completely unmanageable. . . . A boycott is a general method of doing business and lacks the specificity of price-fixing or territorial division which are practices that lend themselves more immediately to per se treatment . . . a boycott must be connected up with competition before it can be condemned with assurance." Rahl, *Per Se Rules and Boycotts Under The Sherman Act: Some Reflections on the Klor's Case*, 45 Va. L. Rev. 1165, 1172 (1959). See also Comment, *Joint Ventures and Boycotts: Some Suggestions on Per Se*, 15 Stanford L. Rev. 638, 639, 653-4 (1963) (" . . . some practices which are literally prohibited by the current per se rules, such as noncommercial boycotts, have no anticompetitive effects. . . . The administration of the per se rule against boycotts or concerted refusals to deal is likely to be hampered by lack of formulation . . . no determinative definition of the forbidden conduct has been expounded. . . ."); Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 Michigan L. Rev. 671, 672 (1966) (" . . . the boycott concept is itself too vague, and has been too loosely applied, to be useful in judging marketing practices."); Montague, *Per Se Illegality and The Rule of Reason*, 12 A.B.A. Antitrust Section Rep. 69 (1958); von Kalinowski, *The Per Se*

suppliers of recreational services to compete for the custom of those who choose voluntarily to participate in a particular tournament event not be declared *per se* illegal, but rather be exposed to a jury determination of reasonableness.

II.

The Per Se Rule Has Been Applied So As To Deprive Petitioners Of A Jury Determination Of The Factual Basis Of Their Liability.

Before the *per se* rule of liability can ever properly be applied, there must be a finding by the trier of facts that the conduct in question is that type of conduct which has judicially been declared a *per se* violation. For example, in a price-fixing case, the defendants must be found *as a matter of fact* to have conspired to fix prices. In a group boycott case, the defendants must be found *as a matter of fact* to have conspired to do those things which this Court has held to be a *per se* group boycott.

This is not what occurred in the case at bar. In addition to erroneously sanctioning the application of the *per se* rule, which should not have been applied at all, the Court of Appeals has also sanctioned the District Court's charge to the jury that the tournament eligibility rule was a group

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Doctrine—An Emerging Philosophy of Antitrust Law, 11 U.C.L.A. Law Rev. 569 (1964); Barber, *Refusals to Deal Under The Federal Antitrust Laws,* 103 U. of Pa. L. Rev. 847, 876-879 (1955); Comment, *Is Per Se the Rule for Boycotts?,* 35 U. of Colorado L. Rev. 577, 591 (1963) ("It should be possible by carefully limiting the kinds of boycotts and situations to which one applies the *per se* rule to make it logical, reasonable, and fair. This is what was done by the district courts in *Insurance Board of Cleveland* and *United States Trotting Ass'n.*").

boycott and a *per se* violation of the Sherman Act. In this respect, the charge stated (Tr. 2773):

> "There are certain agreements or practices which, because of their adverse effect on competition are conclusively presumed by law to be unreasonable; these are therefore unlawful regardless of the surrounding circumstances. Among these practices, which are unlawful in and of themselves, are price fixing and group boycotts.
>
> "For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.
>
> "A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

Since, as the District Court also charged the jury, the eligibility rule was the only thing claimed by the plaintiff to be a group boycott, the eligibility rule was the only factor in the case to which this part of the charge could pertain. This charge was erroneous on its face as a definition of a *per se* illegal group boycott, since it did not accurately describe the kind of boycotts this Court has held to be *per se* illegal. We must concede, however, petitioners did not question the definition in the District Court. Notwithstanding, they did ob-

ject, *inter alia,* that this instruction was not applicable because the eligibility rule was not such a boycott. (Tr. 2023-33; R. 227-228.) The point we urge here is that this charge was clearly prejudicial even had the *per se* rule otherwise been applicable, because it withdrew from the jury the factual question whether a *per se* group boycott was established by the evidence. Its effect in this case was to direct the jury to find the eligibility rule to be a *per se* boycott "regardless of the surrounding circumstances," and hence, to find the petitioners liable.

A. The Charge Instructed The Jury That The Eligibility Rule Was a Per Se Violation.

In its opinion, the Court of Appeals twice stated that the District Court did not instruct the jury that the eligibiliy rule was a *per se* violation, but rather defined a group boycott in general terms and "left it to the jury to determine whether or not the eligibility rule was in fact a group boycott." (Appendix B, 23, 26, *infra.*) In this the Court of Appeals has misapprehended the charge.

After stating the nature and effect of *per se* violations, and fixing in the jury's mind the link between price-fixing and group boycotts as examples of *per se* violations, the District Court gave the boycott instructions which were immediately followed by the price fixing instructions, as follows (Tr. 2773-4):

[Boycott Instructions]

"For purposes of this case, a group boycott may be defined as the concerted refusal of a group of persons engaged in some line of commerce to deal with others—that is, to sell their goods or services to others—unless the potential customers agree that they will not do business with other firms which are competitors of the persons in the group. In other words, a group boycott is a combination of business concerns to boycott potential customers unless the customers restrict their trade and custom to the members of the group and avoid patronizing outside competitors.

"A group boycott is unlawful even though those who are parties to it claim that it was adopted for the purpose of eliminating practices thought by them to be trade abuses or undesirable trade practices."

[Price Fixing Instructions]

"The plaintiff claims that the defendants entered into a conspiracy or combination to fix the price charged for bowling. *If you should find that the defendants did conspire to fix the price charged for bowling in Western Washington,* and the conspiracy—if any existed—did not substantially affect the flow of interstate commerce, in other words, it was a purely local conspiracy, then there would be no violation of the antitrust laws. However, if you find that some amount of interstate commerce was affected, and that amount was not insignificant, as I will more fully explain later, then any conspiracy to fix prices would be a violation of the federal antitrust laws."

In contrast with the price fixing portion of the charge, no opportunity was given to the jury to reach a decision on the issue: "*If* you should find that the defendants did conspire to establish a group boycott . . . " The crucial fact issue, "Was the eligibility rule a group boycott?" was effectively withdrawn from the jury, and petitioners have been found liable without a jury determination on this issue.

The Court of Appeals has thus sanctioned a deprivation of petitioners' right to jury determination of the factual basis of their liability. This is contrary to the guarantee of jury trial in the Seventh Amendment to the Constitution of the United States and is such a departure from the accepted and usual course as warrants the exercise of this Court's supervisory power. Moreover, an important Federal question as to how the *per se* rule of liability should be applied is here raised which has not been but should be settled by this Court. It is essential to the protection of the rights of litigants in treble damage cases that the factual basis for liability be determined by the trier of facts, the jury in this case, and not be withdrawn from the jury in the guise of applying the principle of *per se* liability.

B. The Improper Applications Of The Per Se Rule Were Not Harmless Errors. The Prejudice Arising From The Erroneous Boycott Instruction Infected The Section 2 Verdict As Well As That Under Section 1.

The error in applying the *per se* rule to the eligibility rule, discussed in Point I above, and as well the error in instructing the jury that the eligibility rule was a *per se* illegal group boycott, discussed in Point II above, each was reversible error. Thus, each is an issue decisive of the case. We should have thought it self-evident that these errors also infected and vitiated the jury's verdict under Section 2 as well as under Section 1. However, the comments of the Court of Appeals respecting the jury's verdict for respondent under Section 2 of the Sherman Act (Appendix B, 25-26, *infra*) imply that these errors were harmless since the Section 2 verdict was sufficient to sustain the judgment. This is not so.

First, respondent both alleged and argued that the eligibility rule was *a part of the alleged conspiracy to monopolize* as well as a violation of Section 1. (R. 5-6; Tr. 2584, 2587.)

Second, the jury was not charged that the eligibility rule had relevance only to the Section 1 charge. Rather, it was made plain that the jury should consider the eligibility rule in determining the Section 2 charge as well. (See, *e.g.*, Tr. 2759, 2767-8.)

Third, the boycott instruction that the eligibility rule was a *per se* illegal group boycott to keep bowlers from patronizing non-member proprietors, must necessarily have led the jury to conclude that petitioners were guilty of a boycott to monopolize the trade of league bowlers in Tacoma.

Fourth, the charge directed the jury in effect to disregard petitioners' evidence respecting the purposes of and justification for the eligibility rule. Such evidence was relevant to a necessary question under the Section 2 claim, that is, whether the petitioners acted from legitimate business aims or instead with the specific and subjective intention to monopolize league bowling in Tacoma. *Report of the Attorney General's Committee on the Antitrust Laws*, p. 61 (1955); *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 626 (1953); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963). Thus, in place of consideration of petitioners' evidence that they had no intention to do other than sponsor tournaments for their best customers and to avoid the harmful effects of sandbagging, the jury was required to substitute a *per se* illegal group boycott to monopolize league bowling, having a presumed illegal effect upon commerce.

In the face of these factors, it is no wonder the jury also found petitioners liable under Section 2. Indeed, were petitioners guilty of a per se illegal boycott, this would in most cases establish a Section 2 violation as well. See *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 180 F. Supp. 125, 140-141 (D. Mass. 1960), affirmed 284 F.2d 582 (1st Cir. 1960); *United States* v. *New Orleans Insurance Exchange*, 148 F.Supp. 915, 920 (E.D. La. 1957), affirmed per curiam 355 U.S. 22 (1957). It should be axiomatic that if the issue of petitioners' liability was submitted to the jury on the premise that the *per se* rule applied, and instead the rule of reason was the proper test of liability, the judgment on the jury's verdict necessarily must be set aside and the case resubmitted on the standard against which petitioners' conduct properly should be measured. *Paramount Film Dist. Corp.* v. *Village Theatre*, 228 F.2d 721, 726 (10th Cir. 1956); *Lawlor* v. *National Screen Service Corp.*, 238 F.2d 59, 65 (3d Cir. 1956), judgment vacated on other grounds per curiam 352 U.S. 992 (1957).

Even were it not so plain that the verdict under Section 2 also stemmed from the errors discussed above, it is nevertheless plain that in jury cases, where reviewing courts have no means of ascertaining why a particular verdict was reached, any substantial error which *could* have prejudiced the appellant is reversible error. *It cannot be fairly said that the jury reached its verdict under Section 2 without regard for the illegal group boycott the District Court said existed in this case.* Thus, since one theory of liability upon which the verdict under Section 2 may have rested, *i.e.*, the *per se* illegality of the eligibility rule, was erroneous, it is immaterial there may have been other theories to support this verdict. *Sunkist Growers* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962).

III.

The Holding That The Requisite Effect Upon Commerce Was Present Conflicts With The Lieberthal Decision.

The decision below, that the evidence was legally sufficient to support the verdict that the eligibility rule had the requisite effect on commerce, conflicts with the decision of the Court of Appeals for the Second Circuit in *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), affirming 221 F.Supp. 685 (S.D. N.Y. 1963).

In the *Lieberthal* case, plaintiff had leased his premises in Plattsburgh, New York, to defendant North Country so the latter could operate a 32-lane bowling establishment. He alleged the other defendants, which operated bowling establishments in Plattsburgh, conspired with North Country to cause the cancellation of the lease, in violation of the Sherman Act. With respect to interstate commerce, the amended complaint alleged that the Plattsburgh area drew bowlers from Canada and Vermont, that establishments in Plattsburgh competed with alleys in Canada and Vermont, that patronage of bowling leagues in Vermont and Canada was actively solicited, that solicitation of trade was done by radio and television advertisements, that bowling equipment to be installed in the leased premises as well as other merchandise and supplies to be sold on the premises came from out of state, and that the defendants operated interstate businesses.

Accepting these allegations as true, the District Court nevertheless granted defendants' motion to dismiss for failure to state a claim. The basis for its decision was that a bowling establishment is a local business and that the alleged restraints therefore did not have the requisite substantial effect upon interstate commerce. The Court of Appeals affirmed on the same ground. 332 F.2d 269 (2d

Cir. 1964). Because the opinions in both the District Court and the Court of Appeals so clearly spell out the local character of a bowling establishment and the reasons why restraints applied to such an establishment do not sufficiently affect interstate commerce, substantial portions thereof are set out in Appendix D, 51-55, *infra*.

The facts alleged and found insufficient as a matter of law in *Lieberthal* are of considerably more substance than the evidence respecting interstate commerce in the case at bar.

Lieberthal clearly involved just what is said to be involved here, an alleged conspiracy of bowling proprietors to injure the plaintiff's business of operating a competing bowling establishment. There is even less in evidence here than was alleged there. Nothing in the Court of Appeals' attempted distinction of *Lieberthal* detracts from the conclusion of the Second Circuit that bowling establishments are local businesses and that restraints applied to such establishments are not subject to the Federal Antitrust laws just because some bowlers may come from out of state or because incidental supplies sold therein come from out of state. Nor is it pertinent that more than one non-member establishment is allegedly affected by the eligibility rule, as contrasted with the single establishment in *Lieberthal*. However large the number, each is a local business upon which the only possible restraint is loss of patronage from some bowlers. The sum of a number of zeros is still zero.

The requisite effect upon commerce has thus been found to exist in this case on the basis of facts which the Second Circuit has heretofore found legally insufficient. This Court should resolve this conflict.

IV.

The Recovery of Post-Filing Date Damages Conflicts With Other Decisions and With the Federal Rules of Civil Procedure.

Respondent has been permitted to recover damages based upon acts occurring after the date the complaint was filed, notwithstanding no supplemental complaint was filed in accordance with Rule 15 (d) of the Federal Rules of Civil Procedure. This is in direct conflict with prior decisions of the Ninth Circuit itself, and with decisions in other circuits. Moreover, in affirming this result, the Court of Appeals has acted in conflict with Rules 15(d) and 16 of the Federal Rules and has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers to correct. Unless this Court intercedes to reinstate the proper procedure, the case at bar will serve in future cases as authority for the granting of relief beyond that prayed, without notice to the opposing party.

A. The Proceedings In The District Court.

Respondent sought recovery of $50,000 actual damages based upon two theories of lost profits. It claimed damages of $17,611.31 based upon loss of profits from specific business during three bowling seasons, 1961-62, 1962-63, and 1963-64. These losses were largely based upon five leagues which stopped bowling at respondent's establishment. It claimed additional damages of $32,503.68 based upon the alleged general loss of profits from open bowling during the same three bowling seasons. See Appendix E, which is respondent's Exhibit 239 summarizing its damages. All of these damages were caused, according to the respondent, by the eligibility rule.

The jury's award of $35,000 actual damages was not segregated in any way, either as to the respondent's two damage theories or as to the time when the acts occurred which caused these damages to accrue. Necessarily, this award had to be predicated upon each of the two theories and had to include substantial damages based upon acts which occurred after the date the complaint was filed, December 7, 1961. Indeed, on the face of the appended resume, most of the claimed damages had to be based upon acts occurring after the filing date.

Petitioners contended in the District Court that damages based on post-filing acts were not recoverable and evidence thereof was inadmissible. The District Court overruled their objections to evidence of any alleged damages based on acts occurring after the filing date. (Tr. 853-4, 1141.) In addition, before the trial commenced, petitioners requested the Court to instruct the jury that the damage period ended on the filing date. (R. 48, 69.) Instead, in accordance with respondent's contention, the District Court instructed that respondent could recover for damages based on acts occurring up to the end of the 1963-64 bowling season. (Tr. 2782.) In short, the trial theory pursued by petitioners was that damages based on post-filing acts were not recoverable and evidence thereof was inadmissible. Respondent pursued the contrary theory. Petitioners' objections and requested instructions were refused and they were forced to defend themselves on the lines drawn by the District Court.

B. The Decision Conflicts With Other Decisions.

Although conceding that the filing of a supplemental complaint by respondent "should have here occurred," the Court of Appeals has nevertheless permitted respondent to recover substantial damages necessarily based upon

post-filing date acts. This directly conflicts with the Ninth Circuit's previous decision in *Flintkote Company* v. *Lysfjord,* 246 F.2d 368, 394, 396 (9th Cir. 1957), in which the Court stated:

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages. . . ."
>
> * * *
>
> "Appellees assail the limitation of damage rule on its merits, but we find no compelling reasons for discarding so late in the day such a well-established rule. Not only the need for preserving some semblance of certainly in the law, but also the relatively simple procedural method of averting the time limitation pitfall dictates this result.
>
> "The proper procedure to be followed in seeking recovery for injuries caused by acts occurring after the filing of the action is to file a separate suit, as was done in *Bordonaro Bros. Theatres* v. *Paramount Pictures, supra,* or a supplemental action, *Bigelow* v. *RKO Radio Pictures, Inc., supra,* or as the administration of justice dictates upon the remand of the instant case, by a supplemental complaint."

The same Court of Appeals reaffirmed these principles in *Independent Iron Works, Inc.* v. *United States Steel Corporation,* 322 F.2d 656, 673 (9th Cir. 1963).

A supplemental complaint has always been deemed to be the proper procedure in order to recover in the same action damages based upon post-filing date acts. Rule

15(d) of the Federal Rules of Civil Procedure makes this clear by providing in pertinent part that:

> "(d) *Supplemental Pleadings.* Upon motion of a party the Court may, upon reasonable notice and upon such terms that are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. . . ."

See also *City of Texarkana* v. *Arkansas Gas Co.*, 306 U.S. 188, 203 (1938); *Howard* v. *Jennings*, 141 F.2d 193, 195 (8th Cir. 1944); *New Amsterdam Casualty Co.* v. *Waller*, 323 F.2d 20, 28-29 (4th Cir. 1963); *Slavenburg Corp.* v. *Boston Insurance Company*, 30 F.R.D. 123 (S.D. N.Y. 1962); *Basevi* v. *Edward O'Toole Co.*, 26 F. Supp. 41, 43-44 (S.D. N.Y. 1939) ("a supplemental pleading should, as here, always be filed to form the foundation . . . for relief in respect of any matter which has arisen after suit has commenced"); 3 Moore's Federal Practice ¶ 15.16[1].

What the Court of Appeals has sanctioned in this case, contrary to the above authorities, is well described in *Hazeltine Corp.* v. *R.C.A.*, 20 F. Supp. 668, 674 (S.D. N.Y. 1937), where the court refused to allow recovery based upon post-filing date acts:

> "The best that can be said for such a procedure is that it is a convenient judicial short cut by which to reach the defendant's purse and property. But judicially devised procedural short cuts are, it seems to me, always to be avoided because it is wholly impossible to foresee and adequately chancer a priori all their implications."

C. The Decision Conflicts With Federal Rules 15(d) and 16.

The Court of Appeals' decision not only conflicts with the foregoing authorities, but in justifying this result, it has announced a new theory for which no authority is cited

and for which we suggest there is neither authority nor reason. The Court based its decision "on the lack of surprise to appellants, and the trial theory pursued below. . . ." (Appendix B, 29, *infra.*) There is no precedent for the view that a supplemental pleading to enlarge the relief requested is excused because of "lack of surprise" to the opposing party. Such a theory is fraught with danger and will work injustice in future cases as it does here. The burden is on the pleader to supplement his pleading if he desires to rely upon post-filing circumstances.

The basis of the "lack of surprise" theory is the Court of Appeals' holding that in the pre-trial order (R. 160-187), the parties agreed that respondent could recover damages based on post-filing acts. However, one will read the pre-trial order in vain to find any such agreement. Rule 16 of the Federal Rules, having to do with pre-trial procedure, provides that the Court "shall make an order which recites the action taken at the conference," including "the amendments made by the parties. . . ." There is no provision in the pre-trial order here allowing amendments or even noting that amendments were considered, nor does the order recite any agreement of the parties that damages based upon acts after the filing date could be recovered. At most, it reflects only respondent's contention that it was injured in its business in the amount of $50,000 "to date." (R. 174.) The Court of Appeals apparently attached significance to the term "to date." (Appendix B, 27, *infra.*) However, this term did no more than state respondent's contention which, on the record in this case, was only that acts of petitioners done prior to the filing date caused damages to continue to accrue thereafter. See, *e.g., Lawlor* v. *Loewe,* 235 U.S. 522, 536 (1915). In no event does this term, or anything else in the order, indicate the parties agreed respondent could recover on the

basis of post-filing date acts. As we have already noted (p. 39, *supra*), every indication elsewhere in the record is that the petitioners expressly refused to agree that the respondent could recover for such damages. Moreover, if there was an agreement, it was reached between court and counsel during the trial when petitioners were granted a standing objection to evidence of damages based upon post-filing date acts. (Tr. 853-4.) **If as the Court of Appeals concluded, the parties had agreed in the pre-trial order to enlarge the damage period, neither the District Court nor the respondent would subsequently have agreed petitioners could have a standing objection to such evidence.**

Thus, important Federal questions involving pre-trial orders are also raised here. The Court of Appeals has implied an agreement in the pre-trial order. Apart from the fact that this is entirely unwarranted by the record and manifestly unfair to petitioners, the effect of this implied agreement is to make the pre-trial order a supplemental complaint. Giving such effect to the order is contrary to Rule 15(d) which provides the only procedure for supplemental pleadings, and to Rule 16 which nowhere states that one function of a pre-trial order may be to serve as a supplemental pleading. By its reference only to "amendments" to pleadings, as contrasted with supplemental pleadings, Rule 16 does not authorize supplemental pleadings by way of the pre-trial order. The distinction between amendments to pleadings and supplemental pleadings is well recognized. See *e.g., Bush* v. *Pioneer Mining Co.,* 179 Fed. 78, 80 (9th Cir. 1910); *Slavenburg Corp.* v. *Boston Insurance Co.,* 30 F.R.D. 123 (S.D. N.Y. 1962); *United States* v. *L. D. Caulk Co.,* 114 F. Supp. 939, 940 (D. Dela. 1953); *Berssenbrugge* v. *Luce Mfg. Co.,* 30 F. Supp. 101 (D. Mo. 1939); *Town of Texhoma ex rel. Versluis* v. *Neild,* 9 F.R.D. 739, 740-741 (D. Okla. 1943).

The procedure here sanctioned by the Court of Appeals opens the door to attempts to recover post-filing damages without supplemental pleadings and shifts the burden to the opposite party to make an affirmative showing that post-filing damages are not recoverable. In contrast, the law has always been that the burden is on the plaintiff to supplement his complaint if he wishes to enlarge his relief on the basis of post-filing date events. This Court should correct this significant departure from the accepted and usual course of judicial proceedings, which conflicts with Rule 15(d) and finds no authority in Rule 16.

Conclusion

For the reasons stated, a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

SAMUEL W. BLOCK
KENNETH J. BURNS, JR.
Of RAYMOND, MAYER, JENNER & BLOCK
Suite 3300
135 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners.

T. PATRICK CORBETT
C. R. LONERGAN, JR.
Of CORBETT, SIDERIUS & LONERGAN
847 Logan Building
Seattle, Washington 98101

RICHARD H. WELS
Of MOSS, WELS & MARCUS
341 Madison Avenue
New York, New York 10017
Of counsel.

APPENDIX A.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

PACIFIC LANES, INC., *Plaintiff*, vs. WASHINGTON STATE BOWLING PROPRIETORS' ASSOCIATION, a corporation, *et al.*, *Defendants.*	Civil Action No. 5381 MEMORANDUM DECISION (Filed March 9, 1965)

The above-entitled cause is now before the court upon defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial and also upon plaintiff's motion for an award of reasonable attorneys' fees in the amount of $30,000.

Defendants have not separately stated the grounds upon which their motion for judgment notwithstanding the verdict is based. However, it appears that of the fifteen allegations of error points numbered 1, 10 and 13 relate to this issue and the remaining twelve are in support of defendants' motion for new trial. Points 1, 10 and 13 will be discussed first.

The first ground of error is:

> "There was no evidence, or any reasonable inference from evidence, that plaintiff and defendants were engaged in interstate commerce or that any restraint with which defendants were charged substantially affected interstate commerce within the meanings of Sections 1 and 2 of the Sherman Act."

Grounds 10 and 13, in substance, are that the court should have ruled as a matter of law that no substantial effect upon interstate commerce existed; that the question should not have been submitted to the jury; and that the issue was one of jurisdiction which is always to be ruled upon by the court. For support, the defendants rely upon *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, affirmed 332 F. 2d 269 (2 Cir. 1964).

The court has given thoughtful attention to the *Lieberthal* case and has declined to follow it for two reasons. First, because *Lieberthal* is factually different from the present case; and second, because I feel our circuit has different views than the second circuit with respect to certain crucial points.

In the *Lieberthal* case the bowling alley had not yet begun operation. It had been built but not equipped. At that point the lease was cancelled by the defendant because, as alleged by plaintiff, of a conspiracy in restraint of trade. There was a provision in the lease which provided for cancellation by the defendant. The plaintiff alleged that the flow of equipment and supplies to the new alley constituted interstate commerce and that there would be interstate solicitation of bowlers once the alley commenced business. The district court found that the installation of equipment was a "one shot" affair, and the further flow of supplies to the alley would be too insignificant to put it into the stream of interstate commerce. Furthermore, the plaintiff did not allege a restraint in the interstate activities of the defendant, only a restraint in the intrastate ones. On this basis the second circuit affirmed.

In the case at bar the plaintiff had an established, thriving business. He alleged that interstate restraints were directly affecting that business and that the amount

was substantial. And he alleged that the interstate restraints were tending towards a monopoly of the bowling business in the State of Washington. The specific effect of the alleged restraints was a reduced capacity to participate in tournaments and to draw out-of-state bowlers to tournaments, a reduction of the interstate rental payments which were substantial and continuous, and a reduced amount of incidental purchases of bowling supplies such as shoes, balls, and pins. These allegations of fact, in my opinion, were enough to cast doubt upon the applicability of *Lieberthal* to the Pacific Lanes' situation.

Secondly, our circuit has recently ruled upon a case where the factual situation is the twin of the one at bar—*Monument Bowl, Inc.* v. *Northern Calif. Bowling Prop. Ass'n.,* 197 F. Supp. 208 (N.D. Calif. 1961), reversed 316 F. 2d 787. While that case only decided upon the advisability of permitting a motion to amend a complaint it does give some guidance in this situation. In *Monument Bowl* the district judge dismissed the complaint because the plaintiffs had failed to allege a restraint of "commerce among the several states." The plaintiff made no such error here. Furthermore, the district judge was not inclined to permit amendment. He felt the complaint contained such "inherent frailties" that an amendment could not cure them. Our court of appeals reversed. Quoting *United States* v. *Hougham* (1960) 364 U.S. 310, the court said:

> " 'If the underlying facts or circumstances relied upon by a plaintiff *may be* a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.' " (Emphasis added.)

I confess to having harbored the same doubts as did the district judge in *Monument Bowl.* Judging solely by the complaint the interstate commerce involved here appeared negligible. However, as I read *Monument Bowl* the decisional tenor of our circuit counsels patience and urges inquiry into the facts. Summary dismissals are not favored. Only after the evidence is in, when it is apparent the plaintiff cannot recover, is it proper to dismiss the action. The plaintiff in the present case pleaded jurisdictional facts. Jurisdiction depends upon facts pleaded—not facts proved. The court was therefore constrained to closet any motion to dismiss based upon jurisdiction until proof upon this issue was adduced. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* (1951) 341 U.S. 246, 249. Even if the parties had agreed to try the issue of jurisdiction separately (which they had not) the result would be the same. The over-all merits of the case and the facts relevant to jurisdiction were intermingled. They were so intermingled that the most sensible and expeditious way to dispose of the case was by trial. Fortunately, the court was able to find a case from our circuit which further supported its decision to try the case. The holding of *Marks Food Corporation* v. *Barbara Ann Baking Co.,* (9 Cir. 1960) 274 F. 2d 934, is situationally in point. The court there stated:

> "It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separate issue."

This is precisely what the court would have had to do—consider the factual merits of the claim in deciding the jurisdictional issue. Once the evidence had come in I was unable to say, as a matter of law, that the connection of

the parties with interstate commerce was "'insignificant and insubstantial.'' The jury being the trier of facts, it fell to them, after proper instruction, to decide this question. In response to specific interrogatories, the jury found that the amount of interstate commerce affected was not "insubstantial or insignificant," settling the jurisdictional question.

Under the law in the ninth circuit, as I interpret it, and the evidence as adduced in this case the questions with respect to impact on interstate commerce, restraint of trade and monopolization were issues for consideration and determination by the jury and the motion for judgment notwithstanding the verdict will be denied.

The remaining specifications of error set forth in defendants' motion relate to alleged grounds justifying or requiring a new trial.

For their second, third and fourth grounds of error the defendants claim that the court committed prejudicial error in giving an instruction on group boycotts and in failing to give certain requested instructions of the defendants. These omitted requests were numbered 23, 27 and 29.

Unquestionably, it is the duty of the court to give a correct requested instruction. On the other hand, it is Hornbook law that the court is not required to give, as requested, instructions which need explanation, modification or qualification, C.J.S., Trials § 408.

Regarding the group boycott instruction, the defendants do not contend that it is an incorrect statement of the law. The claimed error is that in failing to give requests 23, 27 and 29 the group boycott instruction by itself was "misleading," and its "misleading" effect could only be overcome by "balancing" with the defendants' requests.

Throughout the trial there was an abundance of evidence that the defendants had combined and refused to sanction any bowler for tournament play unless he did his bowling exclusively in an Association establishment. In the complaint the plaintiff had specifically alleged a violation of the Clayton Act provision relating to tying agreements; the plaintiff specifically alleged a group boycott with the purpose of establishing a monopoly (complaint pp. 7, 5 and 6.)

Furthermore, the plaintiff introduced voluminous evidence of meetings, writings, statements, and actions on the part of the individual defendants and the Association which tended to show that their combined aim was the exclusion of competition. The tendency and necessary effect of such an exclusion is a restraint of trade. In view of all this evidence, from the witnesses of both parties, it seems to me that it would have been plain error *not* to give a group boycott instruction.

Defendants' theory in response to these allegations seemed to be that past abuses in the sport of bowling had necessitated the formation of the Association "to promote, and protect the sport of bowling." *Fashion Originators' Guild* v. *Federal Trade Commission* (1941) 312 U.S. 457, shows clearly that there are limitations upon the powers of an association to restrict even abuses which are admittedly unfair. Furthermore, trade associations, because of their obvious temptations to concerted action, are closely scrutinized by the courts and the administrative agencies. See generally, *Fashion Originators' Guild* v. *Federal Trade Commission, supra; Federal Trade Commission* v. *Cement Institute,* (1948) 333 U.S. 683; *Associated Press* v. *United States* (1945) 326 U.S. 1; *Christiansen* v. *Mechanical Contractors Bid Depository* (D. Utah 1964) 230 F. Supp. 186.

Associations may be formed and may operate, but they have a perimeter that has been judicially described. If the defendants wished to have the jury instructed upon the rule-making power of an association it was the defendants' duty to submit an instruction which clearly and accurately outlined the limits of the perimeter.

The following are the requests submitted by the defendants on this issue:

No. 23:

"Defendants have the right to adopt and enforce rules and regulations in order to regulate, standardize, and promote competition in the sport of bowling, and such regulations are not unlawful even though an incidental effect may be to restrict the business of the plaintiff.

United States v. *West Trotting Association,* 1960 Trade Cases, Para. 69,761 (S.D. Ohio, 1960).

United States v. *Bakersfield Associated Plumbing Contractors, Inc.,* 1958 Trade Cases, Para. 69, 087."

No. 27:

"If you find that the main purpose and chief effect of the eligibility rule and its enforcement is to foster the bowling business by the promotion of standardized rules and regulations regarding participation in tournaments without any unlawful intent to monopolize or restrict trade, then even though such rules or regulations incidentally restricted competition and interstate commerce, such acts do not constitute a monopoly or attempted monopoly in violation of the antitrust statutes of the United States.

Whitwell v. *Continental Tobacco Co.,* 125 F. 454."

No. 29:

"An association composed of members involved in the same business or calling may make reasonable rules and regulations and may impose sanctions upon

such members for a violation of said rules, including fines and expulsion of such members for a violation of rules. Such acts and practices are not unlawful.

U. S. v. *Southern Wholesale Growers Association,* 207 F. 434."

Regarding number 23, this instruction appears to be questionable on its face. I have always supposed that no organization, other than Congress or bodies authorized by Congress, have the "right to adopt and enforce rules and regulations in order to regulate * * * competition in the sport of bowling," unless the bowling activities are wholly intrastate. To hold otherwise would be to allow businessmen to regulate themselves and would trench upon the authority of the courts and administrative bodies. See *Fashion Originators' Guild* v. *Federal Trade Commission, supra.* The requested instruction further implies a policy which is antagonistic to the purpose of the antitrust laws. That purpose is to promote the free and unrestricted interplay of competition. Defendants' request would indicate that businessmen may regulate competition as they please, so long as their avowed purpose is a salutary one.

Additionally it should be noted that the facts in *United States* v. *West Trotting Association* (correct citation is "United States Trotting Association") were materially different from the facts at bar. There the government moved for summary judgment on the ground that the rules of the trotting association were unlawful *per se.* The court held that the association rules were not unlawful *per se.* Both parties agreed that they had no further proof to offer, and the court therefore made a statement of factual findings. The ones applicable to this case are as follows:

1. USTA had never denied track membership to any application for a five-year period prior to the complaint.

2. The plaintiff failed to establish that the main purpose of the association and its rules was different from its stated purpose of providing a *voluntary association open to all those interested in the betterment of harness racing.* (Emphasis added.)

3. Since USTA admitted all those interested in racing, there was no monopoly.

4. Out of 10,709 applications for individual membership, only 6 were rejected. The rejections were for infractions such as race fixing, and one rejectant had a long list of gambling convictions.

5. All of the rules and regulations were adopted to meet undisputed evils which had previously occurred in racing.

6. The eligibility certificates for each horse were $2 and were issued only to members in good standing.

7. There were only 31 horses and owners under suspension, out of all those registered, and the suspensions had been given for such offenses such as (a) failing to pay entry fees; (b) bad checks; and (c) forging mating certificates.

8. USTA functions in subordination to all state laws, and this is stated specifically in its charter.

9. One rule of the USTA was that horses which were not members of the USTA were barred from participating in any race except a "free for all," which was limited to horses that had won over $50,000. However, USTA had never in fact denied any eligibility certificate under this rule (Rule 5, § 1).

10. USTA takes no direct part in the management of any race meeting.

Contrast this with the situation in Pacific Lanes. Here, testimony, documents, and admissions—tacit and otherwise—clearly permitted the inference that the true purpose of the association was two-fold: to promote bowling in the Tacoma area, and to do so by impeding the competitive effectiveness of the "independent" bowling proprietors. The evidence indicated that the Association accomplished the latter of its twin purposes by concerted pressure, by denying applications for "eligibility certificates," and making the forms abstruse and difficult to fill out. The Association did not admit all those interested in bowling. In practice, it only admitted the larger, newer establishments. The dues were high, possibly by design, so that the smaller, older houses could not afford the price of the Association. The evidence will sustain a finding that the "evils" which the Association has supposedly been formed to combat were of doubtful existence. "Sandbagging," or deliberately bowling below one's capacity, was one of the claimed abuses which required the formation of the Association. However, many of the witnesses claimed that they had never heard of any instances of this practice, or of "rigging" or of the other infractions claimed by the defendant to be threatening the competitive health of the bowling industry.

On the other hand, the existence of the Overbuilding Committee, and its attempts to restrict the construction of new bowling facilities, was further evidence that the chief "abuse" concerning the Association may have been only that of stiff competition among bowling houses rather than unfair practices on the part of competitors in the sport of bowling, as they claimed. All of these factors, when taken together were strong indications that a domi-

nant theme in the Association's existence was the curtailment of competition. Finally, the crucial difference between the *Trotting* case and the case at bar is that USTA took no direct part in the management of any race meeting. This is telling evidence of the good faith of USTA; their only profit was the general betterment of the sport. With the members of the Bowling Proprietors' Association, however, the facts are reversed. The Association promoted, and its members received a direct, financial benefit from the tournaments sponsored by the BPAA.

Based upon the *Trotting* case, the defendants' request should have contained standards for judging whether the rules adopted by the BPAA were reasonable in light of the evidence. Some of these might have been:

(a) Whether the Proprietors' Association was open to all;

(b) Whether the dues were reasonable;

(c) Whether the proprietors had any financial interest in the tournaments;

(d) Whether the rules were a reasonable approach to the correction of the alleged abuses; and

(e) Whether it is reasonable to suspend a member for any violation other than one which involves fraud or a failure to keep the equipment maintained according to an objective standard.

None of the above standards were included in request 23; nor was there any statement in this request regarding the scope or effect of the organization's rule-making power in the event there was an underlying conspiracy, which the jury later found existed. Therefore, by the *ratio decidendi* of this case the defendants' request is an inadequate statement of the law in view of the proof presented at trial.

In the defendants' request 23 there was no explanation of the effect that collusion would have on the "reasonableness" of the rules adopted.

The evidence tending to prove unfair practices on the part of the defendants also nullifies *Bakersfield* as authority for the defendants' request, for the same reasons discussed regarding the *Trotting* case.

Defendants' requested instruction 23 was discussed in the conference on instructions, but it was rejected as written (pp. 28, 29, Transcript of Proceedings December 24, 1964 at 10:00 a.m.). At the time I considered using certain of defendants' requests to balance the plaintiff's request on group boycotts. However, the cases cited in support of the defendants' request did not support the language of the proposed instruction when taken in conjunction with the evidence of the case. The request as submitted was therefore refused. Thereafter no rewritten request was submitted.

Proceeding to defendants' request 27, it is my opinion that it is an incomplete statement of the law as it stands today. The cited authority for this case is a 1903 eighth circuit case. A few years after this decision the Clayton Act was passed, and Judge Medina in *Dictograph Products* v. *Federal Trade Commission* (2 Cir. 1954) 217 F. 2d 821, was of the opinion that the Clayton Act (with its specific proscription to tying arrangements and the "may be" test) was passed to overrule this decision. As authority for such an instruction *Whitwell* is therefore seriously in question. Moreover, the instruction is incomplete in that it does not explain the course for the jury if the incidental effect is one that "may be to substantially lessen competition." This is precisely why group boycotts are illegal.

Considering next defendants' requested instruction number 29, the cited authority in support is a 1913 district court case from the fifth circuit. While the age of a case is not necessarily an infirmity it invokes an attitude of caution, especially in a field of law subject to fairly rapid developments. I believe it was Justice Holmes who said that the maximum precedent-life of a case was twenty years; and he was talking about Supreme Court cases. As with the *Whitwell* case, the Clayton Act and the Federal Trade Commission Act were both passed after this decision. Both acts have had a profound effect upon trade associations and their conduct. Moreover, *Southern Wholesale Grocers* has only been cited once by a higher court (in 1925) during its sixty or so years of existence. All these were circumstances for consideration in deciding whether to add still more to the voluminous instructions which the jury were to receive.

Request 29 is also, in my opinion, misleading. It implies that businessmen may freely band together, make rules among themselves and impose appropriate sanctions to enforce those rules. Since there is nothing in the request to the contrary the wording infers a perfect freedom of association and rule-making power, including, presumably, the power to make rules affecting competition. This is not the law. A similar argument of unlimited association was urged upon the Supreme Court in *Associated Press* v. *United States* (1945) 326 U.S. 1, 15. The court there stated:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

The defendants' request would appear to lead the jury to a different opinion of what the law is. Being an incomplete statement of the law, the defendants' request 29 was rejected.

There is one final comment which runs to all three of the requests—they are essentially arguments. Underlying each of the requests is the question of intent and effect. Associations may make rules and regulations providing their intent, effect, and tendency is not restrictive. The questions of intent and restraint were treated at length in the instructions (pages 18, 23 and 25 of the instructions). These requests of the defendants are primarily a response, showing motivations, to the charge of restraint and monopolization. Counsel for defendants could have and, as I recall, did argue to the jury what the various reasons were behind the actions of the bowling associations. The purpose of instructions is to expound the law and not present argument. It is the duty of counsel to argue the case.

Defendants' fifth ground of error is that the court should have instructed the jury that the plaintiff was not entitled to recover for a violation of the antitrust laws in general. The jury was instructed according to the test in *Page* v. *Work* (1961) 290 F. 2d 323; the jury was told that the plaintiff could recover only if the interstate restraint affected his business.

Defendants' sixth ground of error is the failure of the court to instruct the jury (requested instruction number 33) that harm to the general public is an essential element. The short answer to this contention is that the jury found defendants violated both Sections 1 and 2 of the Sherman Act. The Supreme Court in *Klor's, Inc.* v. *Broadway-Hale*

Stores, Inc., (1959) 359 U.S. 207, 211, in commencing on violation of said sections of the law, stated (referring to an earlier decision):

> "As to these classes of restraints * * * Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred."

For this reason the defendants' request was refused.

Defendants' seventh ground of error is the failure of the court to give their request number 34. This request was subject to the same objection noted with respect to request number 33. It pointed out to the jury that if plaintiff's competition was only with other bowling proprietors in the State of Washington there was no injury within the purview of the Sherman Act. It is the nature of the restraint which determines jurisdiction under the Sherman Act, not the identity of the competitor. See *Broadway-Hale, supra.* The defendants' request was properly refused.

Defendants' eighth ground of error is the court's failure to give requested instruction number 11, stating that if the same goods were purchased within the State of Washington, and the same amount of bowling business was conducted within the State of Washington, there would be no effect upon interstate commerce. Our circuit has ruled that the test of an effect upon interstate commerce is qualitative, not quantitative. See *Las Vegas Merchant Plumbers Association* v. *United States* (9 Cir. 1954) 210 F. 2d 732. Therefore, if the defendants' actions had only a distortionary effect—and not necessarily a diminishing one—their conduct would still be subject to the sanctions of the antitrust laws. The requested instruction did not correctly state the applicable law.

Defendants' ninth allegation of error complains of a comment contained in the court's instructions with respect to the size or area subject to monopolization, as follows:

> "Combination that affects trade in one city or even a part of a city may violate the anti-trust laws."

It is my view that the evidence fully justified the statement and that the comment—if it be considered such—was applicable under the facts of the case.

The remaining allegations of error need but brief comment. Numbers 10 and 13 were dealt with at length at the beginning of this memorandum.

The alleged error numbered 11 relates to the ruling not permitting certain exhibits used by defendants' expert witnesses in support of their testimony to go to the jury. This could not have been prejudicial. The exhibits were illustrative only and the true evidence was the opinion of the expert as to possible damages.

The twelfth alleged error to the effect that the jury was governed by passion and prejudice because of the allegedly short time spent in deliberation and the size of the verdict is submitted without affidavit or showing of any kind and therefore needs no further consideration.

The contention made by defendants, under the fourteenth ground of their motion, that requested instruction No. 18 as to mitigation of damages should have been given, I believe is without merit for the reason that in the event the jury should find as they did that plaintiff had suffered damage there was no evidence whatsoever tending to prove that plaintiff had not made reasonable efforts to develop open-play bowling.

Likewise, with respect to alleged error No. 15, my view of the evidence supporting the instruction given to the effect that price-fixing constituting a *per se* violation of the Sherman Act is contrary to that expressed by defendants and I therefore reach the conclusion as to this alleged error, as well as to all alleged errors set forth in defendants' motion as grounds for granting a new trial, that no prejudicial error occurred.

ALLOWANCE OF ATTORNEYS' FEES

Plaintiffs having prevailed in this action, an application has been made for an allowance of attorneys' fees as provided by statute in the amount of $30,000. While the testimony of counsel in support of the amount sought as well as the estimate of time spent in preparation and trial would sustain allowance of $30,000, it is my view that the records of plaintiff's counsel with respect to the precise nature of the work done are inadequate. As I stated in a memorandum decision in the case of *Barksdale* v. *Time Oil Company*, Civil #5638, counsel employed to initiate antitrust litigation know at the onset of the proceedings that they will request an attorney's fee under the statute if they prevail. The statute, I believe, anticipates that such application be supported by detailed records of time spent and work done. I do not believe the time records as submitted in this case are sufficiently detailed as to service performed to justify an allowance of $30,000. I will allow the sum of $22,500.

An order in accordance herewith may be submitted by counsel for plaintiff.

Dated March 9, 1965.

William J. Lindberg
/s/ *William J. Lindberg*
United States District Judge

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WASHINGTON STATE BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, PIERCE-OLYMPIC BOWLING PROPRIETORS ASSOCIATION, INC., a corporation, TOWER LANES, INC., a corporation, BOWLERO, INC., a corporation, DAFFODIL BOWL, INC., a corporation, PARADISE BOWL, INC., a corporation, C. A. LOYD and JANE DOE LOYD, his wife, d/b/a SIXTH AVENUE LANES, THEODORE TADICH and JANE DOE TADICH, his wife, DEZ ISAACSON and JANE DOE ISAACSON, his wife, KENNETH KULM and JANE DOE KULM, his wife, PHILLIP CUNNINGHAM and JANE DOE CUNNINGHAM, his wife, CLEVE REDIG and JANE DOE REDIG, his wife, and ART UNKRUR and JANE DOE UNKRUR, his wife,

Appellants,

vs.

PACIFIC LANES, INC., a corporation,

Appellee.

NO. 20,134

[February 2, 1966]

Appeal from the United States District Court for the Western District of Washington Northern Division

Before: BARNES, KOELSCH and BROWNING, Circuit Judges

BARNES, Circuit Judge:

This is an appeal from a final decision of the United States District Court for the Western District of Washington. The district court had jurisdiction pursuant to 15 U.S.C. §§ 15, 26, and 28 U.S.C. § 1337. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

This appeal arises from the final decision of the district court, entered upon the verdict of a jury that defendants (appellants here) were guilty of violations of sections 1 and 2 of the Sherman Act with respect to what might be called "organized bowling", which had injured plaintiff (appellee here) in the amount of $35,000. The final order of the district court trebled these damages to $105,000 and allowed $22,500 as attorney fees.

Appellee is the owner-operator of a bowling establishment located in Tacoma, Washington. Appellants are a number of other bowling establishments in Tacoma and their owners, and the state and local trade associations of bowling proprietors in which they are members. In the original complaint the national bowling proprietors association (Bowling Proprietors Association of America, Inc.) was named as a defendant, but service as to it was quashed, and it was thereafter named as co-conspirator but not a party.

The original complaint of December 7, 1961, alleged violations of both the Sherman and Clayton Acts. The Clayton Act allegations were withdrawn before submission to the jury and are not in issue on this appeal. The Sherman Act allegations charged that the defendants were engaged in an unlawful combination and conspiracy extending throughout the United States with the purpose of restraining and monopolizing trade and commerce. The specific unlawful conduct of appellants in furtherance of this combination, as framed by the pretrial order, are summarized by appellee as follows (Appellee's Brief, pp. 3-4):

> "That the said combination and conspiracy have consisted of a continuing agreement and concert of action by and between the defendants, and other parties, the

substantial terms of which have been that the defendants agree:

"1. To conduct, sponsor and sanction bowling tournaments so as to make them open only to those persons who restrict, or who agree to restrict, their league bowling and tournament bowling entirely to establishments which are members of the three bowling proprietors associations, rejecting and declaring ineligible for the tournaments any bowler who does, or who has done, any organized bowling in an establishment not belonging to the association. These restrictions have been carried out by the adoption and enforcement of so called 'eligibility rules' . . . The intended and actual effect of the said agreements, rules and practices has been and is to deprive non-member establishments of the patronage of persons who wish to engage in organized bowling, to enforce a boycott against non-member establishments, and thereby to suppress competition and monopolize the bowling industry.

"2. To limit and restrict the number and size of bowling establishments by coercing and dissuading others from building or expanding such establishments, and by soliciting suppliers and manufacturers of bowling equipment, and other persons, not to deal with such persons . . . .

"3. To fix and stabilize, insofar as possible, the prices charges [sic] for bowling, and to refrain from competing for the patronage of bowlers except as against non-member establishments.

"4. To regulate and control throughout the United States, including Western Washington, the number of bowling establishments, the size of bowling establishments, and the conditions under which bowling may be

carried on, all for the purpose of monopolizing and eliminating competition in the bowling industry. . . ."

At the trial appellee relied primarily on proof of the existence and effect of the tournament eligibility rules maintained and enforced by the various bowling proprietors associations, and of the "over-building committee" activities of the Bowling Proprietors Association of America (BPAA) and Washington State Bowling Proprietors Association (WSBPA). Appellee alleged damages to its business of $50,000 and introduced proof thereof, as well as evidence tending to show that the conduct of appellants had had a substantial effect on interstate commerce. At the close of plaintiff's case, defendants moved for a directed verdict on the grounds that the plaintiff's evidence did not substantiate that there was a restraint on *interstate* commerce. The district court denied the motion with respect to the alleged violations of the antitrust laws by virtue of the eligibility rule, and reserved ruling with respect to the "overbuilding" element. The motion was renewed at the close of all evidence and denied.

In instructing the jury, the district court cautioned that the appellee had not proved that it had suffered any damage by reason of the "overbuilding" committees, and that no damages could be awarded on the basis of that evidence, but that that evidence should be considered to determine the presence or absence of a conspiracy. The district court then submitted the case to the jury with special interrogatories. The jury answered these interrogatories by finding that all defendants had conspired to restrain trade in violation of section 1 of the Sherman Act; that all defendants had conspired to or attempted to monopolize commerce in violation of section 2 of the Sherman Act; that defendants' unlawful acts had substantially affected the interstate com-

merce portion of plaintiff's business and that the unlawful acts also substantially affected other interstate commerce; and that defendants' violations had caused loss to plaintiff's business in the amount of $35,000. (C.T. 219-226)

After the verdict was announced defendants moved for judgment n.o.v., or for a new trial, which motions were denied in a memorandum decision filed March 9, 1965. Judgment was entered on the verdict consisting of treble damages plus $22,500 in attorney fees and costs. This appeal followed. In this court, attorneys for appellee filed a "Motion for Assessment of Additional Attorney Fees on Antitrust Appeal," asking this court to award them $8,670.75 in the event of affirmance for work done in defending the judgment on appeal. No opposition to this motion was filed by appellants.

We consider *seriatim* the issues raised by appellants.

I—*The Boycott Instruction*

Appellants contend that the district court erred in charging the jury with regard to the eligibility rule, in that the district court instructed that the rule was a group boycott and, therefore, a per se violation. Appellants contend that the rule is not a "commercial boycott" and that only "commercial boycotts" can be per se illegal. Appellants further contend that the error in instructing the jury was compounded by the failure of the district court to give two balancing instructions requested by appellants (Nos. 23 and 27), and that the erroneous boycott instructions vitiate the verdict and judgment under section 2 of the Sherman Act, as well as section 1 where the eligibility rule was the primary basis of the violation. Appellee asserts that the objection to the boycott instruction was not properly raised and has therefore been waived.

a. Appellee's contention regarding *waiver* of the boycott instructions is untenable. At a conference on instructions before the conclusion of the trial appellants' attorney did state that the instructions as proposed were correct statements of the law but were inapplicable and inappropriate in this case for a number of reasons, including the reasons that the eligibility rule was not a commercial boycott, that the eligibility rule was legitimate action by the bowling proprietors associations for the purpose of regulating their own tournaments, that there was a fact question for the jury as to whether the rule was a reasonable regulation of competition or an illegal boycott, and that the instructions would be improper if not balanced by appellants' instructions setting forth their theory of the rule and letting the jury decide which interpretation to adopt. (R.T. 2016-2033) Before the charge was given the district judge told counsel that they might rely on the exceptions made in conference if they wished to do so. (R.T. 2726) Appellants renewed most of these same objections after the charge had been delivered by the district judge. (R.T. 2084-5) While these exceptions were perhaps not stated as artfully or formally as they might have been, we believe that they were sufficiently adequate to preserve the issue on appeal. (Rule 46, Federal Rules of Civil Procedure.)

b. The group boycott instructions given did define a group boycott as a per se violation of the Sherman Act, and left no room for operation of the rule of reason. (R.T. 2773-4) The district judge did *not,* however, instruct the jury to find that the eligibility rule was a group boycott and hence illegal per se, but rather defined what constituted a group boycott in general terms, and left it to the jury to determine whether or not the eligibility rule constituted such a boycott. The primary question for determination on this is-

sue is therefore whether this was an appropriate situation for the use of a per se rule of illegality, or whether the jury should have been instructed that if appellants' purpose in having the eligibility rule was reasonable then it did not violate the Sherman Act, even though it constituted a group boycott.

Group boycotts are per se violations of the Sherman Act. *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 (1959), and cases cited therein. Appellants argue that this rule applies only to *commercial* boycotts, meaning presumably boycotts directed against "other traders" as in the *Klor's* case, *supra.* This contention is refuted by the language of recent decisions of the Supreme Court and of this court[1] in cases which held refusals of manufacturers or dealers to deal with customers to be per se violations of the Sherman Act.

Appellants' objections, both preceding and following the charge to the jury, went to the necessity for instructions that appellants had the right to place restrictions on their business which were designed to prevent cheating such as "sandbagging" or other abuses, even though such restrictions might incidentally restrict commerce. Presumably

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[1] *Radiant Burners* v. *Peoples Gas Co.,* 364 U.S. 656 (1961); *Jerrold Electronics Corp.* v. *Wescoast Broadcasting Co.,* 341 F.2d 653 (9th Cir. 1965.) As the Supreme Court said in *Radiant Burners, Supra* (364 U.S. at 660): :

> "By §1, Congress has made illegal: 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . .' *Standard Oil Co.* v. *United States,* 221 U.S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

such instructions would have indicated that the restrictions were designed to promote the sport of bowling rather than to constitute a boycott. We have reviewed the record in regard to these objections and find ourselves in agreement with the statements of the trial judge in his memorandum decision (C.T. 237-42). He held that the evidence in the case did not justify or support such proposed instructions. Even assuming that abuses in the sport existed, it has been established since the case of *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457 (1941) that such circumstances do not justify a private association passing regulations to deal with the problem when their effect is to restrain or regulate interstate commerce.

Appellants further urge that the district court erred in not giving the boycott instructions which were proposed by appellants. The trial judge answered this contention in his "Memorandum Decision" (C.T. 236-45) in a thorough manner, and we agree with his conclusions. The trial court is under no obligation to give faulty instructions, 88 C.J.S., Trial, § 408 (1955), and the record shows that appellants made no effort to submit correct instructions after the district court had pointed out faults in the refused instructions. While we do not suggest a trial court is under no obligation to charge on a material issue after requested to do so, even if the instructions as proposed are faulty, we cannot find that this omission, in light of the evidence in this case and the authorities cited above, was such a failure.

c. We find no merit in appellants' contention that "The erroneous boycott instructions also vitiate the verdict and judgment under section 2". As we have discussed, *supra,* no error was committed in the giving of the boycott instructions. Secondly, appellants again in this argument incorrectly state that the district court instructed the jury that

the eligibility rule was a group boycott. Again we say, the district court did not so instruct the jury but rather gave a general definitional instruction on group boycotts and left it to the jury to determine whether or not the eligibility rule was in fact a group boycott. Finally, appellants contention that an attempt to monopolize requires proof of specific intent, and that there was no such proof in this case, is without merit. The court's instructions contained a specific and proper charge on specific intent. (R.T. 2768) The evidence in this record is ample to support a specific finding of intent to monopolize. The jury so found when it answered "Yes" to the special interrogatory on the section 2 violation. In any event, appellants' failure to raise the issue of inadequacy of proof or inadequacy of the charge as to specific intent below requires us to hold that such grounds have been waived. We find no error in the verdict as to liability on the section 2 ground.

II—*Damages*

a. Appellants contend that the award of damages is excessive in that recovery was permitted for injury alleged to have occurred through the 1963-1964 bowling season, rather than being limited to recovery to the date of the filing of the complaint. Appellee counters that although appellants are correct in stating that appellee did not file an amendment or supplement to the complaint to include damages up to the time of trial, appellants have waived this objection by not having raised it below, and by preparing to try and trying the case on the theory that damages through the 1963-1964 season were in issue.

Appellants are correct in asserting that this court has held that in the case of damages resulting from a continuing conspiracy or from continuing acts in violation of the Sherman Act, recovery is limited to damages suffered to the

date of filing the complaint, and that damages after that date are properly raised by a new complaint, or the filing of a supplemental complaint. *Flintkote Company* v. *Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), and *cf. Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 673 (9th Cir. 1963). This should have here occurred. However, appellee's waiver argument receives substantial support in the record. The pre-trial order, dated December 11, 1964 (C.T. 160-187), nowhere specifically defines the period for which damages should be considered, but it does include agreed facts and allegations of both sides extending past the date of the filing of the complaint. This included the $50,000 damages, allegedly suffered "to date," *i.e.*, 1964, the date of the pre-trial order.[2]

Appellee, under the practice current in the district court, was entitled to rely on the issues defined by the *agreed* pre-trial order setting forth such issues. If such a stipulated definition of issues works a manifest injustice to one party or the other, it can be modified at the trial. (Rule 16, Fed. R. Civ. P.) *Fowler* v. *Crown-Zellerbach Corp.*, 163 F.2d 773 (9th Cir., 1947); *Frank* v. *International Canadian Corporation*, 308 F.2d 520, 528 (9th Cir. 1962); and *cf. Rogers* v. *Union Pac. R. Co.*, 145 F.2d 119, 123 (9th Cir. 1944).

No party was here taken by surprise. Appellants' expert accountant witnesses testified to their examination of records extending into the 1963-64 season (C.T. 266-69). Written exhibits dealing with post-complaint damages were prepared by and introduced on behalf of the appellants. When appellants questioned the cut-off date at the start of trial, the trial judge ordered that legal memoranda be sub-

[2] *Cf.* references to specific language and four record references on pages 39-40 of Appellee's Brief.

mitted to him. Before he had ruled on the issue, appellants' counsel suggested a delay in the ruling (R.T. 853-4); and evidence of "subsequent damage" was introduced. Finally, the jury was instructed, without objection from defendants-appellants (R.T. 2804-10), that the critical dates were October 15, 1960, and the end of the 1963-64 bowling season.[3] (R.T. 2782)

Nowhere do appellants show they were unprepared to meet the issue of damages incurred subsequent to the filing date. The burden is on them to do so. The case was tried on the theory such damages were material.

The motion for new trial was presented and argued on the theory damages subsequent to the filing date were material.

We need not condone the inexactness of the pre-trial statement, but we are required to interpret it with liberality to save the cause of action. *Johnson* v. *Geffen*, 294 F.2d 197, 199 (D.C. Cir. 1960). It is now too late to urge that the case should have been tried on a different theory.

We recognize that appellants did not comply with Rule 75, Federal Rules of Civil Procedure, nor with Rule 17(6) of this court, because they did not include this point in their statement of points on appeal. However, the cases cited by appellee to support the proposition that this court there-

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[3] It is only fair to note that appellants did offer instructions limiting damages to pre-filing damages, which instructions were refused. Appellants urge that a request for an instruction is in substance an objection to the charge as given. It may well be (*Wright* v. *Farm Journal, Inc.*, 158 F.2d 976, 978 (2d Cir. 1947), particularly when it expresses a differing theory of law—but it need not necessarily be, particularly where it relies on facts.

fore need not consider the point on appeal for that reason, are distinguishable.[4]

We, therefore, prefer to rely on the lack of surprise to appellants, and the trial theory pursued below, rather than a technical failure of appellants to include this point in their points on appeal.

b. Appellants likewise urge there was insufficient evidence to support the award of damages.

We note that this claim was not raised at the trial—there was no motion for a directed verdict at the close of the evidence. *Cf. Cellino* v. *United States,* 276 F.2d 941 (9th Cir. 1960).

We refer to our language with respect to damages in antitrust cases. Once a jury finds plaintiff was injured by defendant's unlawful acts, it may estimate the amount of

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[4] *Western Nat. Ins. Co.* v. *La Clare,* 163 F.2d 337 (9th Cir. 1947), the court noted that three points which had been argued had not been stated in appellants' statement of points and therefore need not be considered. However, the court then stated that it had considered the points anyhow. It does not appear whether or not proper objection had been made in the trial court. In *State Farm Mut. Auto Ins. Co.* v. *Porter,* 186 F.2d 834 (9th Cir. 1950), the court noted that the point argued had not been included in the statement of points and that the instructions objected to and the objections had not even been included in the printed record. Nevertheless, the court stated that it had examined the unprinted portion of the record, and dismissed the objection only when it found that no exception had been taken in the trial court and that the objection had in fact been waived there specifically. In *Watson* v. *Button,* 235 F.2d 235 (9th Cir. 1956), the court refused to consider an issue on appeal which had not been stated in the statement of points to be relied on, but qualified the refusal with the fact that the pertinent portion of the record had not been designated by the appellants and was not before the court and therefore could not be considered on that ground.

damages proximately flowing from the illegal act. In showing the *fact* of damage, plaintiff is charged with a higher quantum of proof than in proving the *amount* of damage. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Flintkote Company* v. *Lysfjord, supra.* As to amount, exact certainty or any precise formula is not required. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851, 856 (9th Cir. 1965). Circumstantial evidence is valid, and a comparison of profits "before and after" is valid, and of some evidentiary value, though not conclusive.

The special jury verdict specifically found on the fact of damage, *i.e.*, financial loss (C.T. 223). There was direct evidence of the amount of damage. Appellee lost the play of five "Leagues." It was estimated this loss was $17,611.31 in three years (Ex. 259). Additional losses were "estimated," to an alleged total of over $50,000. The jury awarded $35,000.

It is true appellee's estimates of damages were disputed and vigorously attacked by appellants on cross-examination. Such estimates, say appellants, were "unsupported 'mere interested guesses,'" (Reply Brf. p. 25) and "only $7,104.49 of plaintiff's alleged damage may be said to find support in the evidence" (Reply Brf. p. 26). Such characterization cannot wipe out the evidence; it merely emphasizes that a factual question was presented to the jury for its determination which we are without power to change. Nor can we say the verdict is grossly excessive, or such as to shock our conscience.

III—*Effect of Eligibility Rule on Interstate Commerce*

Both parties agree that the question of whether a conspiracy restrains or affects interstate commerce so as to invoke federal antitrust jurisdiction is a question for the jury under proper instructions. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1 (9th Cir. 1960), reversed on other grounds, 370 U.S. 19, rehearing denied 370 U.S. 965 (1962); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1960). In this case the district court submitted two special interrogatories to the jury on the question of interstate commerce; one asking whether the acts of the defendants had substantially affected the interstate commerce portion *of the plaintiff's business* in an amount that was more than insignificant (Int. No. 3; C.T. 223), and another asking whether the acts of defendants substantially affected interstate commerce and that the amount of commerce affected was not insignificant (Int. No. 4; C.T. 223). A "yes" answer to either would be adequate to sustain a finding of jurisdiction in the district court for the whole case. The jury answered "yes" to both interrogatories.

The appellants attack the finding of jurisdiction on two grounds, the first of which is that the evidence was not legally sufficient to support the verdict that the eligibility rule had the requisite effect upon interstate commerce. *Cf.*, Eiger, Commerce Element in Federal Antitrust Litigation, 25 Fed. B. J. 282, 293 (1965). The same contention of appellants was dealt with by the district court in its memorandum decision (C.T. 232-36). In summarizing the evidence offered which may be said to show an effect of the eligibility rule, the district judge pointed out that a reduced capacity to participate in tournaments and to draw out of state bowlers; a reduction of the interstate rental

payments; and a reduction in the amount of incidental purchases in interstate commerce of bowling supplies, followed from the eligibility rule. The district court also distinguished the case of *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685 (S.D.N.Y. 1963), affirmed 332 F.2d 269 (2d Cir. 1964), relied upon by appellants. We agree with its treatment of the *Lieberthal* case, and note particularly that in that case interstate effects arising from wholly intrastate restraint on a business that had not yet come into operation were alleged, whereas in the present case directly interstate aspects such as failure to draw bowlers from Canada, loss of ability to conduct tournaments with interstate attendance and decline in continuing interstate transactions (such as rental payments and sale of goods from a established and thriving business) were alleged and shown resulting from the eligibility rule. On the basis of such evidence we believe that the issue of the interstate effect of the eligibility rule was properly submitted to the jury and that its verdict concludes the jurisdiction question.

Nor can we agree that the testimony of Mr. Grant as to the decline in participation in Washington tournaments by Canadian bowlers was inadmissible. The testimony offered by Grant was definitely material to the issues in the case, and even if some parts of his testimony relating to the records of the Vancouver, British Columbia, City Bowling Association should have been excluded because hearsay, that part of his testimony based on personal knowledge was still sufficient to support a finding of an interstate effect caused by the eligibility rules. Thus any error in admitting hearsay testimony by Grant was harmless error.

IV—*Other Interstate Aspects of the Conspiracy*

Appellants' second contention with respect to interstate commerce is that there is no legally sufficient evidence that the other aspects of the alleged conspiracy, aside from the eligibility rule, affected commerce. Appellee did not contend that it had suffered damages by reason of the price fixing activities or the "over-building" activities of the proprietors' associations, but that evidence was admitted to establish the existence of a conspiracy to restrain trade and to monopolize, and to demonstrate that the conspiracy was interstate in nature. Appellants do not allege that the evidence was improperly admitted for these purposes, but rather argue that it was legally insufficient to show that a connection existed between the various programs (*i.e.*, eligibility rule, overbuilding, and price fixing) and thus did not show that the conspiracy was interstate in nature. With this contention we cannot agree.

The record in this case is replete with testimony and documentary exhibits showing that the national proprietors association (to which all of the local proprietors belonged) as well as the two local proprietors associations (WSBPA and POBPA) had each, at various times involved in this suit, discussed with others, and acted in an attempt to implement, programs to raise and stabilize prices, and to keep out new competitors. The record also establishes that much of the leadership in each of these programs came from the national association (BPAA). Appellee alleged a national conspiracy to monopolize and restrain trade in the bowling industry, including Western Washington. We believe that this was a reasonable inference, which the jury was free to draw, that all of the various programs (eligibility rule, price fixing, over-building committees)

were part of the same conspiracy to that end. The parties involved were the same in each case, and the time was simultaneous. Appellants repeatedly attempt to divorce their local associations from the national association which gave leadership to the conspiracy which the jury found to exist, but provide no proof that the local associations were not part of a national conspiracy and an attempt to monopolize and restrain. They were all members of the national which, though it was not a party defendant since service as to it had been quashed, was alleged to be one of the conspirators. We need not decide whether their participation in such a national conspiracy independently serves to establish the interstate nature of the transactions involved, and by itself, provides jurisdiction of the district court in this proceeding. We hold that the price-fixing and over-building activities independently satisfy the interstate requirements for jurisdiction when, as here, the eligibility rule was another facet of the same conspiracy. The evidence supports the jury's verdict on this point.

In regard to price-fixing, appellants urge that neither the testimony of Hoffman or Stevenson (the owners of Pacific Lanes) should be accorded any weight on price-fixing because of the doctrine of *in pari delicto*. We express no opinion as to whether this doctrine is applicable in antitrust actions, which the appellee denies, because we find it to be unavailing in any event. The theory of plaintiff as to price-fixing was supported by other evidence even without the testimony of Hoffman and Stevenson (see citations to record in Appellee's Brief, pp. 65-6). The appellee did not rely on the price-fixing for proof of damages. In any event the appellants failed to raise the point at the trial and hence must be deemed to have waived it. For this

court to recognize this exception *sua sponte* at this stage of the proceedings, as urged by appellants, in a situation where it did not form the basis for the recovery of damages and was amply supported in the record by other testimony, would open a loop-hole for negligent or crafty counsel to always prevail on appeal.

V—*Attorney Fees on Appeal*

Attorneys for appellee have filed a motion with this court for allowance of additional attorney fees in connection with this appeal in the event that the decision below is affirmed. This motion has not been opposed. $22,500 was allowed below. We decline to assess additional attorney fees.

The judgment is *affirmed.*

APPENDIX C.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT C. DEESEN,
Appellant,

vs.

THE PROFESSIONAL GOLFERS ASSOCIATION OF AMERICA, an unincorporated association, et al.,
Appellees.

No. 19837

[February 23, 1966]

Appeal from the United States District Court for the Northern District of California Southern Division

Before: CHAMBERS, HAMLEY and ELY, Circuit Judges

HAMLEY, Circuit Judge:

Herbert C. Deesen brought this action against The Professional Golfers' Association of America (PGA) and a number of individuals to recover damages and obtain injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act.[1] Damages were claimed in the sum of $70,000, trebled to $210,000. Jurisdiction in the district court was asserted under sections 4 and 16 of the Clayton Act.[2]

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964).

[2] 38 Stat. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1964).

In his complaint, as modified by the pretrial orders, Deesen, who is a professional golfer, claimed that PGA and its members have combined and conspired to monopolize the business of tournament golf professionals in violation of section 2 of the Sherman Act. He also claimed that, as evidenced by PGA's rules and regulations governing the eligibility of entrants into PGA sponsored and cosponsored tournaments, defendants have combined and conspired to restrain, unreasonably, the business of tournament golf professionals, and to boycott plaintiff, in violation of section 1 of the Sherman Act.

After a trial without a jury, judgment was entered for defendants. Plaintiff appeals. In the following paragraphs we summarize the findings of fact entered by the trial court, amplified to include certain undisputed facts stated in the second pretrial order but not carried forward into the findings of fact.

PGA is an association of some 4,300 golfers, founded in 1916 as a voluntary unincorporated non-profit association. The named individual defendants are persons who were, at the time the complaint was filed on April 23, 1959, officers and employees of PGA and members of its tournament committee.

PGA sponsors or co-sponsors substantially all of the professional golf tournaments held in the United States. In order to compete in these golf tournaments, a player must either be a member of PGA, or an approved tournament player, or one of a limited number of participants who may be designated or invited by the local sponsor. Because of the increasing popularity of professional tournament

golf, the increasing number of golfers, and the increasing number of persons eligible to enter PGA sponsored tournaments, and because the limitations of time and space make it impossible to play a full tournament with a field of more than 150 or 160 golfers, some means had to be found to limit the number of golfers who could enter these tournaments. PGA rules limiting entry to PGA members, approved tournament players and a few others, and defining the qualifications necessary for non-member entrants, were intended to accomplish this purpose.

In order to become a PGA member a person must have five years experience, either in the employ of a golf club as a professional or in the employ of a professional, as an assistant at a golf club, or (in recent years) as a tournament player under an agreement with PGA, playing a minimum of twenty-five tournaments per year, or any combination of these methods for a period of five years. Deesen was at all times, and now is, unwilling to become employed by a golf club as a professional or as an assistant to a professional at a golf club.

An approved tournament player must be approved first by a local committee of PGA, then by PGA's tournament and executive committees. Approval is given if the applicant has, in the opinion of each of these committees: (1) the ability to play golf and finish in the money in tournaments in which he competes, (2) the financial responsibility to undertake the golf tours, and (3) moral character and integrity. There are no issues herein as to Deesen's financial responsibility or his character and integrity.

There are no exact or definite standards set up to determine ability to play. The nature of golf is such that no precise standard of ability can be established other than

by comparison of scores and ability to finish in the money in tournaments. In order to enter PGA sponsored and co-sponsored tournaments, PGA members are not required to meet the standards set for PGA-approved tournament players.

Deesen is a professional golfer who was eligible to compete as a PGA-approved tournament player in PGA sponsored and co-sponsored tournaments under contract with PGA from 1952 to 1958.[3] Pursuant to PGA rules and regulations and the tournament player's agreement that Deesen signed, he was required to compete in a minimum of fifteen PGA sponsored tournaments each year and maintain an ability to finish in the money in such tournaments. The requirement of competing in fifteen tournaments a year was later reduced to ten. During this period Deesen was active as a professional golf tournament player, and he placed in the money three times, earning $240.35. Some of his scores were better than some of the PGA members' scores playing in the same tournaments. Deesen's record

[3] One need not be employed by a golf club in order to be a professional golfer. Additional sources of income of professional golfers are winnings from tournaments, from personal appearances on television, radio and moving pictures, and from the endorsement of golfing equipment and other merchandise.

in PGA tournaments from 1952 through 1958 is shown in the margin.[4]

During this time he was otherwise unemployed. However, during part of this period he had a partnership arrangement with his parents to support him while he was thus engaged as a professional golfer. His expenses during the period from 1952 to 1958, were approximately $13,500. In 1958, Deesen sustained an injury which affected his playing ability and prevented him from competing in ten tournaments that year. PGA's tournament field supervisor was informed of this injury prior to September 1, 1958.

PGA sponsors from forty to fifty professional golf tournaments each year, scheduled throughout the nation so as to provide a national tour for golf professionals. The nucleus of the "field" in these tournaments is composed of PGA members and approved tournament players who earn their livelihood by following the tournament circuit. At the present time, over two hundred golfers follow the circuit regularly.

In 1958, PGA's national tournament committee undertook to terminate the approved tournament player status of a number of professional golfers. The committee desig-

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[4]

Year	Number of Tournaments Entered	Number of Tournaments in which Qualified	Average Scores	Money Winnings
1952	0	0	....	0
1953	5	2	76.5 —78	0
1954	9	5	76 —85	$130.00
1955	3	1	79 —79.5	0
1956	10	4	79.75—82	$110.35
1957	10	0	77 —82	0
1958	4	0	76.5 —86	0

nated Harvey Raynor, J. Edwin Carter, and Lou Strong, PGA members and employees, to select the players whose contracts were to be terminated. As a result of their recommendations PGA terminated the contracts of fifty-seven professional golfers, including Deesen. His status as an approved tournament player was terminated by PGA on September 1, 1958. This was done on the grounds that his playing ability was not sufficient in the opinion of the PGA tournament committee, and for failure to compete in the requisite number of tournaments.

Prior to the commencement of this action, but after termination of his status as an approved tournament player, Deesen on a number of occasions applied to PGA and its tournament committee for reinstatement. During this period, plaintiff did not compete in professional tournament golf or play on courses altered for professional tournaments play. During this same period, Deesen's scores were sometimes around par, sometimes in the seventies and were in some instances between par and seventy-five.

After this action was commenced, Deesen again applied to PGA for reinstatement. Pursuant to an agreement reached between the parties at the first pretrial conference in this case, Deesen played a number of "test" rounds of golf with various professionals in the San Francisco Bay Area. His scores on these rounds ranged from seventy-five to eighty-four and averaged over seventy-eight. On this showing, reinstatement was denied.

On January 14, 1959, Deesen appeared before PGA's national tournament committee, presented evidence of his prior injuries and his playing ability at that time and requested reinstatement. Reinstatement was denied.

On the basis of these facts, the trial court further found as follows: Deesen has not shown that the PGA rules were applied to him in a manner different in any way from that in which they were applied to any other approved tournament player or non-member of PGA. The fact that members are entitled to play in PGA sponsored and co-sponsored tournaments without the qualifications required of non-PGA members is not an improper discrimination since membership in PGA is open to all persons on the same conditions.

The district court also found: Deesen has failed to prove the existence of any agreement, combination, or conspiracy entered into for the specific purpose of keeping him personally out of PGA tournaments or for preventing him from making a living as a professional golfer. The evidence shows that admission to the status of an approved tournament player is and has always been open to all persons on the same terms. PGA has not excluded Deesen and other non-PGA members from tournament golf play in an arbitrary and unreasonable manner. The evidence does not establish that Deesen possessed such ability as a golfer that it is unreasonable to bar him from entering PGA tournaments. Deesen has suffered no financial loss as a result of not having been permitted to play in PGA sponsored or co-sponsored tournaments.

On these findings, the trial court concluded that Deesen had not established any violation of sections 1 or 2 of the Sherman Act.

Deesen first argues that the trial court erred in not carrying forward into its findings of fact certain undisputed facts, favorable to Deesen, stated in the second pretrial order. We have included these omitted recitals in

the above resume of the findings of fact. If the findings as so amplified, support the conclusions of law, then the failure to include these undisputed facts in the formal findings was not prejudicial error.

Deesen next contends that the trial court erred in denying his motion to amend the findings of fact and to make additional findings.

We have examined the proposed amendments and additions to the findings. Some of them are, in effect, already incorporated in the formal findings or in the additions thereto which we have inserted in the above resume. Others appear to be broader than the testimony relied upon would warrant, or they are concerned with details of the evidence which need not be reflected in the findings. We find no error in regard to these matters.

Deesen argues, in effect, that under the established facts it must be held that PGA's rules and regulations concerning eligibility to participate in PGA sponsored tournaments are unreasonable restraints in violation of section 1 of the Sherman Act.

In support of this position appellant first contends that PGA rules and regulations are so indefinite as to be incapable of non-discriminatory enforcement and are thus unreasonable. Deesen attacks the method of processing applications for standing as an approved PGA tournament player. Pointing to the fact that such applications must receive the approval of a local PGA section, the sectional executive committee and the national tournament committee, Deesen argues that the standards applied are inadequate and are in any event subject to being disregarded in favor of personal bias.

Such applications must first be approved by the local section of PGA, where the applicant resides.[5] A local section consists of several members selected to handle such administrative affairs. Each applicant is interviewed by the local section; such matters as character and general reputation are considered.[6] The local section also requires each applicant to play two test rounds with members of the section. There is no requirement that the applicant make a certain score, and the test rounds of themselves are not conclusive. General playing ability and ability to play in a way which will enable the player to maintain himself while on the tour, are considered.

Deesen argues that the personal dislike of just one member of a local section could result in denial of application. However, no evidence has been called to our attention indicating that an individual member can control the action of a local section, or that applications are ever denied because of personal dislike unassociated with the standards referred to above.

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[5] The application must be signed by two class "A" members of the local section.

[6] Under PGA rules, each applicant must furnish evidence that he has sufficient ability to finish in the money in tournaments in which he competes, his lowest reported scores and the courses at which they were made, his average score, his reasons for wishing to enter into a tournament player's agreement, and letters in the nature of references which certify to his past achievements. He must also furnish evidence that he has insurance which covers him for personal legal liablity which may arise out of or be occasioned by accidents involving him which may occur in the course of a tournament in minimum amounts of $100,000 for each person and $300,000 for each accident, together with assurance of his financial ability to support himself while participating in PGA tournaments.

In general the same standards are applied by the sectional executive committee and the national tournament committee, based on the results of the local section's inquiry and test rounds. Deesen argues, in effect, that these latter committees have uncontrolled discretion to deny applications for personal reasons entirely disassociated from the indicated standards. But, again, appellant does not call attention to any evidence which the trial court was required to accept, indicating that these top committees have discriminated against applicants on such a basis. It is true that Deesen testified, in effect, that he had been discriminated against in connection with his applications for reinstatement, but the trial court was not required to accept his appraisal of PGA's motivation.

The basic purpose of PGA in requiring persons who seek approved tournament standing to meet certain standards and obtain committee approval appears to be a reasonable one, insofar as the evidence before us indicates. That purpose is to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition.

The means PGA has chosen to accomplish this purpose also appear to be reasonable insofar as this record reveals, having in view the national scope of the activity and the practical problems which had to be met. The trial court did not err in holding that, in these respects, Deesen did not establish a violation of section 1 of the Sherman Act.

Deesen also attacks the PGA tournament entry rules on the additional ground that they are not applied uniformly to members and non-members, asserting that the rules are therefore unreasonable on their face. Appel-

lant's specific grievance here is that a PGA member may play in any PGA tournament regardless of his average score, or his ability to finance himself, or the number of tournaments entered, or his ability to finish in the money regularly. Non-PGA members, on the other hand, may not play unless they obtain standing as PGA tournament approved players in accordance with the standards outlined above.

PGA'S tournament program was originated in the 1930's for the primary purpose of promoting public interest in golf and of giving PGA members an opportunity to improve their skills through active competition. PGA felt, and the record does not negate this, that the welfare of club professionals has a direct relationship to the extent of public interest and participation in the game.

It was soon determined that non-member professionals who had the ability to make a good showing in tournament play should also be permitted to engage in PGA sponsored tournaments. But this was not intended to undermine the initial purpose of giving PGA members this tournament outlet. The problem was solved by permitting anyone to join PGA on equal terms with every other member, and by setting up special requirements for non-PGA members who wished to participate in tournament play.

In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, the Supreme Court said:

> "The true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint

> was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Measured by the test spelled out in *Chicago Board of Trade* v. *United States,* the indicated differentiation between PGA and non-PGA members with regard to the right to participate in sponsored tournaments was not, on this record, shown to be for the purpose of suppressing or destroying competition, nor did it have that effect. The trial court did not err in so ruling.

Deesen contends that the trial court erred in failing to hold that PGA and its members have monopolized the business of tournament golf professionals in violation of section 2 of the Sherman Act.

Appellant premises this argument on three assertions of fact: (1) PGA sponsors and co-sponsors substantially all professional golf tournaments in the United States;[7] (2) to compete in these tournaments a player must either be a member of PGA or a PGA approved tournament player;[8] and (3) PGA has the power to exclude any applicant for participation in these tournaments for any reason whatsoever. Appellant states that, in view of these asserted facts, appellees have monopolized the business of tournament golf professionals in violation of section 2 of the Sherman Act.

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[7] PGA does not sponsor the U.S. Open Championship, Western Open Championship, Masters Tournament, and two or three other major tournaments.

[8] Local sponsors are also permitted to designate a limited number of participants.

The last of these assertions of fact is critical to Deesen's argument, but as worded, it is inconclusive. It is true that generally speaking, any association that undertakes to sponsor a contest of any kind has power to exclude any applicant from participation for any reason whatsoever, unless such power is curtailed by operation of law. The pertinent inquiry, however, is whether an association intends to use that power in a manner which tends to suppress or destroy competition.

Mere size, unaccompanied by unlawful intent or conduct in the exercise of the power gained through size, does not constitute a violation of section 2 of the Sherman Act. *United States* v. *Swift & Co.*, 286 U.S. 106, 116. It is the existence of monopoly power coupled with the intent to use it for anticompetitive purposes or with inevitable anticompetitive effects that establishes the offense of monopolization. *United States* v. *Griffith*, 334 U.S. 100, 107.

No finding nor evidence has been called to our attention which indicates that PGA has used, or intends to use, its position as the sponsor or co-sponsor of a substantial number of tournaments to preclude sponsorship of tournaments by others, to exclude golfers from access to PGA sponsored tournaments, or to suppress or eliminate competition in professional tournament golf.

According to the evidence before us, PGA's creation of the category of approved tournament player tends to promote competition by facilitating participation by proficient younger players. According to the evidence, PGA has also sought to stimulate competition by giving official recognition to many tournaments which it neither sponsors nor co-sponsors. These "approved tournaments" are free

from any PGA control, yet PGA plans its schedule around them and counts them in determining its official standings.

Speaking only with regard to the evidence of record in this case, we hold that the trial court did not err in finding and concluding that PGA did not use its power in a way which is violative of section 2 of the Sherman Act.

Finally, Deesen argues that PGA and its members have combined and conspired to monopolize the business of tournament golf professionals and to boycott and exclude Deesen therefrom in violation of sections 1 and 2 of the Sherman Act.

Under this heading, appellant shifts his attack from the charge of actual monopolization, boycott and restraint to an accusation that PGA has at least combined and conspired to accomplish those results.

Granting that not only actual monopolization and restraint is condemned by the Sherman Act, but also combinations and conspiracies intended to bring about those results, the established facts of this case support one charge no more than the other.

With particular reference to the boycott charge, Deesen's tournament record over a period of several years provided an ample basis for the striking of his name from the list of approved tournament players. Similarly, his showing made during the test rounds arranged after this action was commenced warranted PGA in denying reinstatement to that list. Deesen could still engage in such tournaments if he chose to become a golf teacher employed by a golf club.

PGA is entitled to adopt reasonable measures for holding the tournaments to a manageable number.[9] It was required

[9]At the present time approximately 230 professional golfers follow the tour and regularly enter PGA tournaments. Some seventy of these are PGA members, and the remaining 160 are approved tournament players. Pre-qualifying is generally necessary when there are more than 150 entrants in the tournament. The basic reason for this restriction to 150 tournament players is that only a limited number of golfers can play an eighteen-hole course under tournament conditions during the daylight hours of a single day.

to treat Deesen as well as it treated others in the same category but it was not compelled to give him special treatment merely because he did not wish to accept PGA tournament entry rules and regulations.

The district court did not err in holding, on the established facts of this case, that appellees did not conspire and combine to monopolize, boycott and restrain business in violation of sections 1 and 2 of the Sherman Act.

In view of our conclusions, as stated above, it is unnecessary to consider the arguments of the parties directed to the question of monetary damages and injunctive relief.

Affirmed.

APPENDIX D.

In *Lieberthal* v. *North Country Lanes, Inc.*, 221 F.Supp. 685, 688 (E.D. N.Y. 1963), after referring to decisions involving exhibitions such as boxing matches and theatrical productions, the District Court stated as follows:

> "These situations are entirely unlike the operation of bowling alleys, where the business supplies only the premises and equipment and the customer entertains himself; he is not entertained by the exhibition of persons or apparatus gathered in interstate commerce. The flow to the bowling alley of equipment and appurtenances is not averred in the amended complaint to be continuous and it could not be; it is virtually a 'one-shot' affair, the equipment being durable and long lasting. There is no averment that radio, movie or television rights are sold in respect of the activities conducted at the Plattsburgh alleys and obviously they are not. That radio and television are used to solicit customers for the local activity seems irrelevant; the radio and television stations may be engaged in interstate commerce but not, merely by use of these media, is the advertiser.
>
> "Plaintiff cites *United States* v. *Employing Plasterers' Ass'n of Chicago*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954) and *United States* v. *Women's Sportswear Mfgrs. Ass'n*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949). These cases are not in point because they relate to the interstate sale of goods. Where the process of production, transportation and sale of goods in interstate commerce is a continuous one, a local restraint either at the beginning of the process (as in *Mandeville Farms*, above) or at the end of the process (as in *Employing Plasterers*, above) may nevertheless directly affect interstate commerce.

"Certainly such is not the situation here. On the contrary the bowling alley business is more like the operation of barber shops (*Hotel Phillips, Inc.* v. *Journeymen Barbers, Hairdressers, Cosmetologists, and Proprietors Intern. Union of Amer.*, 195 F.Supp. 664, W.D. Mo. 1961, affirmed per curiam 301 F.2d 443, 8th Cir., 1962), or hospitals (*Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167, 8th Cir., 1959), or publishing legal notices (*Page* v. *Work*, 290 F.2d 323, 9th Cir., 1961). In these cases, incidental flow of supplies in interstate commerce to the local enterprise, or travel in interstate commerce of customers of the local enterprise, or soliciting business in other states for the local enterprise, did not make the local enterprise a part of interstate commerce under the Sherman Anti-Trust Act. See also *Coulter Funeral Home, Inc.* v. *Cherokee Life Ins. Co.*, 32 F.R.D. 358 (E.D. Tenn. 1963) dealing with the question whether operation of funeral homes is interstate commerce under the Act."

In its opinion affirming the District Court in the *Lieberthal* case, the Court of Appeals stated as follows (332 F.2d 269, 271-272 (2d Cir. 1964)):

"The operation of bowling alleys, without more, must be held to be a wholly intrastate activity.

"A business of which the ultimate object is the operation of intrastate activities, such as local sporting or theatrical exhibits, may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character. *United States* v. *International Boxing Club*, 348 U.S. 236, 241, 75 S.Ct. 259, 99 L.Ed. 290 (1955) (25% of income derived from interstate operations); *United States* v. *Shubert*, 348 U.S. 222, 225, 75 S.Ct. 277, 99 L.Ed. 279 (1955) (continuous interstate transportation of personnel, property, communications, and payments); cf. *Aeolian* v. *Fischer*, 40 F.2d 189 (2d Cir. 1930) (organ installation an integral part

of interstate contract of sale). It has frequently been held, however, that the incidental flow of supplies in interstate commerce, *Page* v. *Work*, 290 F.2d 323, 332 (9th Cir.), cert. denied, 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961) (publishing legal notices); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167, 170 (8th Cir.), cert. denied, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959) (hospitals); *Lawson* v. *Woodmere, Inc.*, 217 F.2d 148, 149 (4th Cir. 1954) (cemetery vaults), the interstate travel of customers of the local enterprises, *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 230-32, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947) (taxicab service to and from railroad stations); *Elizabeth Hospital, Inc.* v. *Richardson, supra* at 170-71 of 269 F.2d, the solicitation of business in other states for the local enterprise, *Page* v. *Work, supra* at 329 of 290 F.2d, the utilization of interstate communications media, *Martin* v. *National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949) (interstate broadcast of baseball games), or a location in an area of interstate activity, *Hotel Phillips, Inc.* v. *Journeymen Barbers, etc., Union*, 195 F.Supp. 664, 666 (W.D. Mo. 1961), aff'd per curiam, 301 F.2d 443 (8th Cir. 1962) (barbershops in Greater Kansas City Metropolitan Area), do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.

" 'The controlling consideration * * * [is] a very practical one—the degree of interstate activity in the particular business under review.' *United States* v. *International Boxing Club, supra* at 243 of 348 U.S., at 262 of 75 S.Ct. Lieberthal's complaint alleges that the influx of equipment necessary to outfit the bowling alleys would be substantial. But the initial outfitting would have been a 'one-shot' affair, as the District Judge observed, and could not be held to convert the bowling lanes into an interstate enterprise. The allegations in the complaint do not indicate that the interstate movement of customers and supplies to

North Country Lanes or the interstate advertising by North Country Lanes involved or would have involved a significant degree of interstate activity. Under the above cited authorities, such allegations are insufficient to state a claim for relief under the Sherman Act. See *Martin* v. *National League Baseball Club, supra* at 918 of 174 F.2d ('the bare allegation in a complaint that the defendants made contracts with broadcasting and television companies will not support the jurisdiction of the court').

"It may be that defendants, as owners of national bowling alley chains, are interstate businesses. But 'the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.' *Page* v. *Work, supra* at 330 of 290 F.2d. Accord, *United States* v. *Yellow Cab Co., supra* (carriage by defendant of passengers from one train station to another is in interstate commerce but other taxi transportation to and from stations is intrastate commerce). Lieberthal does not allege any restrain of the national actvities in which defendants are engaged; he complains only of an agreement affecting their intrastate operations.

"We hold that the complaint does not establish a Sherman Anti-Trust Act violation based on acts occurring in interstate commerce.

"We next consider whether the complaint can be sustained as stating a claim for relief based on local acts having a substantial effect on interstate commerce.

"As Lieberthal points out, the Sherman Act condemns wholly local business restraints that affect interstate commerce as well as restraints in interstate commerce. See *United States* v. *Employing Plasterers' Ass'n*, 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954); *United States* v. *New Wrinkle, Inc.*, 342

U.S. 371, 377, 72 S.Ct. 350, 96 L.Ed. 417 (1952); *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 93 L.Ed. 805 (1949). But the effect of the local restraints on interstate commerce must be 'direct and substantial, and not merely inconsequential, remote or fortuitous.' *Page* v. *Work*, *supra* at 332 of 290 F.2d. See also *United Leather Workers Int'l Union* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471, 44 S.Ct. 623, 68 L.Ed. 1104 (1924); *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732, 739- 40 n. 3 (9th Cir. 1954)."

APPENDIX E.

League and Tournament	*Loss*
1961-62	
City tournament	$ 2,408.93
Invitational league	1,731.84
Total	4,140.77
1962-63	
Invitational league	1,731.84
Women's invitational	1,731.84
Tacoma commercial league	1,731.84
Plywood league	1,231.88
Total	6,427.40
1963-64	
Invitational league	1,797.12
Women's invitational	1,797.12
Olympic league	2,164.80
Plywood league	1,284.10
Total	7,043.14
Total — three seasons	$17,611.31
Other	
1961-62	
Day league, open play and other	$10,834.56
1962-63	
Day league, open play and other	10,834.56
1963-64	
Day league, open play and other	10,834.56
Total — three seasons	32,503.68
Grand Total	$50,114.99